

# marinerg-i

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## Final Review and SWOT Analysis of Potential Legal Environment

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0.1	30.06.2017	<b>Responsible</b> Bird & Bird	<b>Authors</b> Roger Bickerstaff; Astrid de Longvilliers; Treena Dunlea-Peatross; Amy Barlow	<b>Reviewed by</b> Gerry Sutton and Fiona Devoy McAuliffe (UCC_MaREI) Cameron Johnstone (UoS)	<b>Approved by</b> Fiona Devoy McAuliffe (UCC_MaREI) Cameron Johnstone (UoS)

Authors (alphabetical)	
Name	Organisation
Amy Barlow	Bird & Bird
Roger Bickerstaff	Bird & Bird
Astrid de Longvilliers	Bird & Bird
Treena Dunlea-Peatross	Bird & Bird

Acknowledgements/contributions (alphabetical)	
Name	Organisation

## Abbreviations

EEIG	European Economic Interest Grouping
EGTC	European Grouping of Territorial Cooperation
ERA	European Research Area
ERIC	European Research Infrastructure Consortium
ESFRI	The European Strategy Forum on Research Infrastructures
JTI	Joint Technology Initiative
JU	European Joint Undertaking
MARINERG-i	Marine Renewable Energy Research Infrastructure
MS	MS
OCT	Overseas Country or Territory
PLOCAN	PLataforma Oceánica de CANarias (Oceanic Platform of the Canary Islands)
RI	Research Infrastructure
SE	Societas Europaea
SWOT	Strengths, Weaknesses, Opportunities, Threats
UCC MaREI	University College Cork Marine and Renewable Energy Ireland
UoS	University of Strathclyde
WP	Work Package

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## MARINERG-I

### EXECUTIVE SUMMARY

This report (Deliverable 5.2) is the updated and final report on the legal structure for the MARINERG-i RI. This report contains a recommendation on the choice of legal structure for MARINERG-I, which concludes that the European Research Infrastructure Consortium (ERIC) is the preferred option for the MARINERG-i RI.

Deliverable 5.1 provided an initial review and SWOT analysis of potential legal environments which are available to MARINERG-i when deciding on which legal structure to choose. Deliverable 5.1 highlighted the advantages and disadvantages presented by each option, and set out draft criteria for the selection of a legal structure, suggesting weightings for each criterion to reflect each criterion's importance when evaluating the different legal structure options.

The draft criteria and suggested weightings were reviewed and updated at a Legal Structures Workshop and an evaluation process was carried out to evaluate each legal structure against each criterion. An overall evaluation scoring matrix was prepared, attached to this report at Appendix 1.

The ERIC legal structure received a favourability percentage of 93% in the evaluation process (see Appendix 1) and was the recommended legal entity for MARINERG-i by a consensus of those attending the Legal Structures Workshop meeting. This recommendation was confirmed by the members of the MARINERG-I consortium. After the Legal Structures Workshop meeting, the minutes and the evaluation outcome table were issued for review to all members of the MARINERG-i Consortium, including those who were not in attendance at the meeting. No adverse comments were received from the members of the MARINERG-i Consortium on the recommendation.

Following behind the ERIC as the recommended legal structure for the MARINERG-i RI were: (1) an International Agreement; and (2) a European Joint Undertaking. Both of these potential legal structures received an 80% favourability percentage in the evaluation process. Whilst both of these potential legal structures have attractions, they also have disadvantages. The disadvantages of the International Agreement were their complexity in set-up and considerable rigidity once they have been established. The key drawbacks of the European Joint Undertaking were identified as being limited membership for non-EU countries, less compatible with the likely business and financial model for the MARINERG-i RI and concerns over lack of limited liability for the members. The remaining potential legal structures scored considerably less well in the evaluation.

Future deliverables in this Work Stream relate to the legal obligations for Core and Node MARINERG-i activities, a "blueprint" for the suitable legal framework for MARINERG-i and preparation of draft legal documentation.

### 1. THE PROCESS

The work of MARINERG-i is organized in nine inter-linked work packages (WP). WP5, “Governance and Legal Framework”, focuses on the assessment of the preferred legal framework for the development and operation of the future MARINERG-i.

Deliverable 5.1 involved the initial review and SWOT analysis of potential legal environments which are available to MARINERG-i when deciding on which legal structure to choose, the SWOT analysis is shown at Appendix 2. Bird & Bird presented the possible legal structures based on the firm's experience in this field and additional research. The legal structures are set out at section 2 of this deliverable and were presented as part of Deliverable 5.1. Deliverable 5.1 highlighted the advantages and disadvantages presented by each option, and set out draft criteria for the selection of a legal structure, suggesting weightings for each criterion to reflect each criterion's importance when evaluating the different legal structure options.

Deliverable 5.1 was then distributed to members of the RI for their review and comments on the legal structure options and the evaluation criteria and weightings. Following this initial review, a Legal Structures Workshop meeting was hosted by Bird & Bird on 10 May 2017 with members of UCC MaREI, the UoS and PLOCAN in attendance, in addition to the Bird & Bird team.

The purpose of the Legal Structures Workshop meeting was to review the legal structures identified in Deliverable 5.1 and discuss their suitability for MARINERG-i. Following an initial review of the working mechanics of the available structures, the workshop proceeded to discuss the criteria to apply in the evaluation of the different legal structures for MARINERG-i, the details of which are discussed further in section 3 below. The evaluation criteria and the appropriate weighting scores were then amended to reflect the outcome of the discussions on the available structures, and then each possible legal structure was discussed in turn against the criteria. Each legal structure was examined against each criterion and a score was awarded to each criterion on a consensus basis. A calculation was then made using the weighting and the points awarded to give a score for that criterion. The same process was applied for all criterion and an overall score for a particular legal structure was determined. This evaluation was then repeated for all of the legal structures to provide the overall scoring matrix, attached to this report at Appendix 1.

Following the discussion and evaluation process, the draft SWOT analysis of the legal structures available to the RI, as set out in Deliverable 5.1, was updated to reflect the points discussed at the Legal Structures Workshop meeting. The updated SWOT analysis is attached to this report at Appendix 2.

After the Legal Structures Workshop meeting, the minutes and the evaluation outcome table were issued for review to all members of the MARINERG-i RI, including those who were not in attendance at the meeting. The minutes set out what was discussed and how the participants arrived at a decision on the most appropriate legal entity for the RI. The purpose of this communication was to enable those who were not in attendance at the meeting to have an opportunity

## Deliverable 5.2



to provide any comments or thoughts on the evaluation process and to provide comments on the recommended legal structure.



## 2. REVIEW OF POSSIBLE LEGAL STRUCTURES

### 2.1 International Agreements

2.1.1 International RIs may be created as a legal entity through intergovernmental treaties (international agreements) which are deposited at the UN. There are many examples of pan-European and international RIs (i.e. the European Space Agency, CERN, European Molecular Biology Laboratory and International Space Station Program). To this extent, an international legal entity may be appropriate as an option for a new pan-European RI.

2.1.2 The international agreement approach for international RIs is a tailor-made instrument in each instance.

2.1.3 It has a flexible framework of settlement of disputes (usually on a State-to-State basis).

2.1.4 There is a possible cross-waiver of liability (for example, article 16 of the International Space Station Agreement establishes "*a cross-waiver of liability by the partner states and related entities in the interest of encouraging participation in the exploration, exploitation, and use of outer space through the Space Station*").

2.1.5 International RI benefit from tax and procurement regulation exemptions. (It should be noted that even when exempted from procurement rules, such large-scale international public partnerships need to respect basic international competition rules and comply with international market transparency and competition policy).

2.1.6 The creation of an international RI requires a long preparation phase. Intensive lobbying activities are necessary to convince the Governments of the importance of the international RI and the need for it to be established as an international RI. (For example, it took 12 years to establish the European Molecular Biology Laboratory as an international legal entity).

2.1.7 However, some experts have noted that the establishment of an international RI is not necessarily time-consuming. Much depends on political will. Moreover, the partners do not necessarily need to organise all their relationships on the basis of multiple international legally binding agreements that would require ratification at national level. The legal framework can be organised through several levels, with only the first level being a multinational agreement that would shape the general structure of the whole partnership.

### 2.2 European Economic Interest Grouping (EEIG)

2.2.1 EEIGs create an opportunity for businesses across different EU MSs to operate together without losing their own identity and independence, in contrast to mergers or joint venture agreements. An EEIG will always be separate from its members' undertakings and has as a purpose to carry

out specific tasks to facilitate or develop the economic activities of its members to enable them to improve their own results<sup>1</sup>.

**2.2.2** Organisations from non-EU MSs are not able to be members of an EEIG; however, an EEIG has legal capacity and is therefore able to enter into arrangements with organisations outside the EU.

**2.2.3** An EEIG may be set up in any one of the EU MSs, and operate in any part of the EU. It will have full legal capacity (i.e. the right to, in its own name, have rights and obligations of all kinds, enter into contracts, sue and be sued)<sup>2</sup>. The EU Regulations on EEIGs require and permit MSs to make certain provisions under national law in respect of EEIGs, which means that the precise way in which these legal entities operate will differ slightly depending on which MS they are set up in (i.e. whether or not it has legal capacity, auditing requirements etc.). EEIGs have to comprise at least two of either: (i) companies or firms<sup>3</sup>; (ii) natural persons; or (iii) one company and one natural person. Depending on which MS the EEIG is registered in, the maximum number of members may be limited to 20 members<sup>4</sup>.

**2.2.4** An EEIG's activities must relate to the economic activity of its members but must be ancillary to them (i.e. an EEIG cannot carry out a profession). The term "economic activity" can be interpreted very widely, meaning that this type of structure could, for example, be appropriate for universities and research institutes.

**2.2.5** An EEIG cannot<sup>5</sup>:

- be formed with the object of making a profit (although it is not restricted from making a profit if this is a consequence of its normal operations);
- exercise a power of management (over its members' own activities or those of any other undertaking);
- hold shares in any of its members;
- be a member of any other EEIG;
- employ more than 500 persons;
- be used to make loans to a company director; or
- be used for the transfer of any property between company and a director.

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<sup>1</sup> Article 3, Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG).

<sup>2</sup> Article 1, Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG).

<sup>3</sup> Companies or firms here are understood as companies or firms within the meaning of Article 58 of the Treaty.

<sup>4</sup> Article 4, Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG).

<sup>5</sup> Article 3, Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG).

- 2.2.6** The governance of an EEIG can be quite flexible, including the types of decision making organs which it can be made up of. However, no one member is able to hold a majority of the voting rights, and a unanimous vote is required in relation to a number of decisions (i.e. altering the objects of an EEIG, altering the number of votes allotted to each member, etc.). The default position for decision making is that decisions must be taken unanimously, however the contract for the formation of an EEIG may prescribe the conditions for a quorum and for a majority in accordance with which all or some of the decisions are to be taken (except in relation to those areas listed in Article 17 of the Council Regulation (EEC) No 2137/85 of 25 July 1985 on the EEIG as being compulsory to be taken unanimously<sup>6</sup>).
- 2.2.7** There is no capital requirement for an EEIG. This means that members have flexibility regarding the method of financing the EEIG. For example, when smaller firms or non-profit making organisations are involved, their contribution may be in the services and skills they can provide. Members may vary their funding methods, rights and obligations by contract so that the EEIG can develop. However, it should be noted that each member of the EEIG will have unlimited joint and several liability for the activities of the EEIG.

### **2.3 Societas Europaea (SE)**

- 2.3.1** SE are European public limited-liability companies which can be created and registered in any one of the EU MSs. They must be treated in the EU MS in which they are registered as a public limited company formed in accordance with the law of that EU MS<sup>7</sup>. For example, in Ireland, this would be either: (i) a public company limited by shares; or (ii) a public company limited by guarantee having a share capital. SEs benefit from a legal personality<sup>8</sup>.
- 2.3.2** An SE can be formed in five different ways: (i) through a merger of at least two existing companies registered in and governed by the law of different EU MSs; (ii) by forming a holding SE between at least two existing private or public limited companies registered in and governed by the law of different EU MSs; (iii) by forming a subsidiary SE between at least two companies registered in and governed by the law of different EU MSs; (iv) by forming a subsidiary SE of an existing SE; or (v) by converting an existing public limited company into an SE.
- 2.3.3** An SE is governed by Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) (SE Regulation). Matters that are either: (i) not covered by the SE Regulation; or (ii) in relation to which the SE Regulation explicitly states that it does not apply, are governed by:

<sup>6</sup> Article 17, Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG).

<sup>7</sup> Article 10, Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE).

<sup>8</sup> Article 1(3), Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE).

- 2.3.3.1 national legislation implementing the SE Regulation;
  - 2.3.3.2 each relevant SE's statutes; and
  - 2.3.3.3 the laws applying to public limited companies in the EU MS in which the relevant SE is (or proposes to be) registered.
- 2.3.4 As the above suggests, EU MSs were given some degree of flexibility with respect to implementing the SE Regulation into their national legal systems. This means that there is no uniform SE legal form across the EU.
- 2.3.5 An SE must have a subscribed capital of no less than EUR 120,000 and its capital must be expressed in euros<sup>9</sup>. Its capital is divided into shares and no shareholder shall be liable for more than the amount which he has subscribed to the SE<sup>10</sup>.
- 2.3.6 The SE Regulation sets out very specific structure and governance requirements<sup>11</sup>, which may be considered quite onerous and administrative.
- 2.3.7 The SE Regulation does not cover the tax treatment of an SE and, therefore, an SE will be subject to the tax laws of the EU MS in which it is registered, and therefore treated in the same way as a multi-national company (whether large or small).
- 2.3.8 The above suggests that an SE addresses mainly the needs of large, already established companies rather than the needs of a European RI.

## 2.4 European Grouping of Territorial Cooperation (EGTC)

- 2.4.1 The EGTC is a European legal instrument designed to *"facilitate and promote, in particular, territorial cooperation, including one or more of the cross-border, transnational and interregional strands of cooperation between its members...with the aim of strengthening Union economic, social and territorial cohesion"*<sup>12</sup>.
- 2.4.2 Its members must generally be located on the territory of at least two EU MSs and can be made up of: (i) EU MSs; (ii) regional authorities; (iii) local authorities; (iv) public undertakings; (v) undertakings entrusted with operations of services of general economic interest; and (vi) any such authorities and/or undertakings from third countries. The Revised EGTC also added the possibility of an EGTC being formed of only one EU MS and a third country or an overseas country or territory (OCT) under specified conditions<sup>13</sup>, which includes that the relevant third country

<sup>9</sup>Articles 4(1) and 4(2), Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE).

<sup>10</sup> Article 1(2), Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE).

<sup>11</sup>Articles 38 – 62, Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE).

<sup>12</sup> Article 1(2), Regulation (EC) No 1082/2006 of the European Parliament and of the Council of 5 July 2006 on a European grouping of territorial cooperation (EGTC), as amended by Article 1(1)(a) of Regulation (EU) No 1302/2013 of the European Parliament and of the Council of 17 December 2013 amending the EGTC Regulation as regards the clarification, simplification and improvement of the establishment and functioning of such groupings.

<sup>13</sup> Article 3a, Regulation (EC) No 1082/2006 of the European Parliament and of the Council of 5 July 2006 on a European grouping of territorial cooperation (EGTC), as amended by Article 1(4) of Regulation (EU) No 1302/2013 of the European Parliament and of

and/or OCT must be neighbouring to at least one of the EU MSs which is part of the EGTC. This means that an EGTC may not be suitable for a fully international RI.

- 2.4.3 The registered office of the EGTC must be located in the country of one of the members and it is the laws of that EU MS under which the EGTC operates and with which the EGTC must comply (in addition to the EGTC Regulations, the Revised EGTC Regulations and the relevant convention governing the EGTC<sup>14</sup>).
- 2.4.4 Before an EGTC can be set up, the approval of each EU MS of a prospective member is required.
- 2.4.5 EGTCs benefit from legal personality<sup>15</sup>.
- 2.4.6 The EGTC is unique in the sense that it enables public authorities of various EU MSs to team up and deliver joint services, without requiring a prior international agreement to be signed and ratified by national parliaments. EU MSs must however agree to the participation of potential members in their respective countries.
- 2.4.7 The purpose of an EGTC is very limited. Article 7(3) of the EGTC Regulation (as amended by the Revised EGTC Regulation) states that *"primarily, the tasks of an EGTC may concern the implementation of cooperation programmes, or parts thereof, or the implementation of operations supported by the Union through the European Regional Development Fund, the European Social Fund and/or the Cohesion Fund"*.
- 2.4.8 The structure of an EGTC is flexible. An EGTC must be made up of at least the following two organs: (i) an assembly, which is made up of representatives of its members; and (ii) a director, who represents the EGTC and acts on its behalf. The EGTC Statutes may provide for additional organs with clearly defined powers.
- 2.4.9 An EGTC is liable for all of its debts and each member's share of that liability shall be fixed in proportion to the amount of its contribution, unless the liability of a member is limited by the national law under which it is established<sup>16</sup>.

## 2.5 European Joint Undertaking (JU)

- 2.5.1 Under Article 187 of the Treaty on the Functioning of the European Union, the EU *"may set up joint undertakings or any other structure necessary*

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the Council of 17 December 2013 amending the EGTC Regulation as regards the clarification, simplification and improvement of the establishment and functioning of such groupings.

<sup>14</sup> Article 8, Regulation (EC) No 1082/2006 of the European Parliament and of the Council of 5 July 2006 on a European grouping of territorial cooperation (EGTC).

<sup>15</sup> Article 5(1), Regulation (EC) No 1082/2006 of the European Parliament and of the Council of 5 July 2006 on a European grouping of territorial cooperation (EGTC), as amended by Article 1(7) of Regulation (EU) No 1302/2013 of the European Parliament and of the Council of 17 December 2013 amending the EGTC Regulation as regards the clarification, simplification and improvement of the establishment and functioning of such groupings.

<sup>16</sup> Article 12, Regulation (EC) No 1082/2006 of the European Parliament and of the Council of 5 July 2006 on a European grouping of territorial cooperation (EGTC), as amended by Article 1(13) of Regulation (EU) No 1302/2013 of the European Parliament and of the Council of 17 December 2013 amending the EGTC Regulation as regards the clarification, simplification and improvement of the establishment and functioning of such groupings.

*for the efficient execution of Union research, technological development and demonstration programmes".*

- 2.5.2 Joint Technology Initiatives (JTIs) are one example of JUs. JTIs create a way of realising public-private partnerships at European level in the field of industrial research, enabling currently fragmented efforts in research to unite and build critical mass.
- 2.5.3 Every establishment of a JU requires an initiative of the European Commission (Commission) and case by case decisions by the Council (following consultation with the European Parliament and the Economic and Social Committee).
- 2.5.4 The Commission will always be a founding member of a JU and will be involved in the decision making process.
- 2.5.5 The statutes or the articles of association of JUs are not pre-defined. Therefore it is a legal instrument which theoretically leaves a large amount of freedom to the founding members to set out the rights and obligations of its members.

## 2.6 European Research Infrastructure Consortium (ERIC)

- 2.6.1 The ERIC legal framework 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<sup>17</sup> with the involvement of several EU MSs. However, in order to promote innovation and knowledge and technology transfer, an ERIC is allowed to carry out some limited economic activities if they are closely related to its principal task and they do not jeopardize its achievement.
- 2.6.2 An ERIC is a legal entity with legal personality and full legal capacity, which has the advantage of being recognised in all EU MSs. ERICs are governed by both EU law and the laws of the EU MS in which it has its statutory seat. ERICs can also have a place of operation in other EU MSs.
- 2.6.3 The membership of an ERIC must include at least three EU MSs. EU MSs can be represented by one or more public entities or private entities with a public service mission. Higher education establishments that perform research with public funding and in accordance with objectives agreed by the state could qualify to represent MS members.
- 2.6.4 Non-EU MSs and intergovernmental organisations can also be members of an ERIC. However, the EU MSs that are members of an ERIC must 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.

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<sup>17</sup> Article 3, Council Regulation (EC) No 723/2009 of 25 June 2009 on the Community legal framework for a European Research Infrastructure Consortium (ERIC).

- 2.6.5** With respect to non-EU MSs which may wish to be part of an ERIC, provisions will need to be made by each relevant non-EU MS 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.
- 2.6.6** In order to be established as an ERIC, a research infrastructure must meet the following five specific requirements<sup>18</sup>:
- 2.6.6.1** 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;
  - 2.6.6.2** 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;
  - 2.6.6.3** effective access, in accordance with the rules established in its Statutes, is granted to the European research community, composed of researchers from EU MSs and from associated countries;
  - 2.6.6.4** it contributes to the mobility of knowledge and/or researchers within the ERA and increases the use of intellectual potential throughout Europe; and
  - 2.6.6.5** it contributes to the dissemination and optimisation of the results of activities in Community research, technological development and demonstration.
- 2.6.7** The procedure for setting up an ERIC involves an application to the Commission<sup>19</sup>. 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<sup>20</sup>. 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 MSs)<sup>21</sup>.
- 2.6.8** An ERIC can be either "single-sited" or "distributed" (an organised network of resources)<sup>22</sup>. The latter ranges between:

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<sup>18</sup> Article 4, Council Regulation (EC) No 723/2009 of 25 June 2009 on the Community legal framework for a European Research Infrastructure Consortium (ERIC).

<sup>19</sup> Article 5, Council Regulation (EC) No 723/2009 of 25 June 2009 on the Community legal framework for a European Research Infrastructure Consortium (ERIC).

<sup>20</sup> Council Regulation (EC) No 723/2009 of 25 June 2009 on the Community legal framework for a European Research Infrastructure Consortium (ERIC).

<sup>21</sup> Article 6, Council Regulation (EC) No 723/2009 of 25 June 2009 on the Community legal framework for a European Research Infrastructure Consortium (ERIC).

<sup>22</sup> Article 2(a), Council Regulation (EC) No 723/2009 of 25 June 2009 on the Community legal framework for a European Research Infrastructure Consortium (ERIC).

- 2.6.8.1** an infrastructure having facilities located in different sites, operated by one legal entity solely; and
- 2.6.8.2** 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<sup>23</sup>.
- 2.6.9** Unlike some of the other legal structures described in this note, 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.
- 2.6.10** It is however worth noting the involvement of the Commission in an ERIC. 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 also 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 this is not remedied after being notified 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.
- 2.6.11** 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 should address as a minimum<sup>24</sup> (i.e. list of members, tasks and activities of the ERIC, etc.).
- 2.6.12** The ERIC qualifies as an international organisation for the purposes of (for example): (i) the VAT Directive<sup>25</sup>; (ii) the excise duty Directive<sup>26</sup>; and (iii) the public procurement Directive<sup>27</sup>.
- 2.6.13** 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

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<sup>23</sup> Page 12, "Legal framework for a European Research Infrastructure Consortium – ERIC" European Commission Practical Guidelines.

<sup>24</sup> Article 10, Council Regulation (EC) No 723/2009 of 25 June 2009 on the Community legal framework for a European Research Infrastructure Consortium (ERIC).

<sup>25</sup> Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, OJ L 347, 11.12.2006, p. 1.

<sup>26</sup> Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products, OJ L 76, 23.3.1992, p. 1.

<sup>27</sup> Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ L 134, 30.4.2004, p.114.



the contribution of the members in the Statutes<sup>28</sup>. It is worth noting that members' contributions may be either financial or "in kind"<sup>29</sup>.

- 2.6.14** 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<sup>30</sup>.

## **2.7 Limited Companies**

- 2.7.1** A limited company has a separate legal personality from its members.
- 2.7.2** The shareholders' liability is limited in proportion to the amount of their contribution to the capital (no shareholder bears personal responsibility for the entity's liabilities).
- 2.7.3** The shareholders have equal rights, depending solely on their participation in the capital, but there is also the possibility that the articles of association require unanimity for taking substantial decisions.
- 2.7.4** Limited companies have open funding models, which allow both cash and in kind contributions by the shareholders that formed it for the company's capital.
- 2.7.5** A limited company has a clear organisation structure – supreme body composed of all shareholders and managing body (individual or collective) elected by them.
- 2.7.6** Limited companies typically allow the free transfer of shares – there are no special obstacles for leaving the company or transferring shares, but the acquisition of shares by a new shareholder requires the approval of the existing shareholders.
- 2.7.7** Although limited companies are incorporated with a commercial purpose and are classified as a merchant in most national legislations, some jurisdictions allow an option for those companies or similar legal forms to be created with a non-profit purpose, such as Gemeinnützige GmbH (Germany) or Community Interest Company – CIC (UK).

## **2.8 Associations (General)**

- 2.8.1** In most MSs, an association is a separate legal entity from its members.
- 2.8.2** The liability of the members is limited to the level of their contribution.

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<sup>28</sup> Article 14(2), Council Regulation (EC) No 723/2009 of 25 June 2009 on the Community legal framework for a European Research Infrastructure Consortium (ERIC).

<sup>29</sup> Page 25, "Legal framework for a European Research Infrastructure Consortium – ERIC" European Commission Practical Guidelines.

<sup>30</sup> Article 12, Council Regulation (EC) No 723/2009 of 25 June 2009 on the Community legal framework for a European Research Infrastructure Consortium (ERIC).

- 2.8.3 Associations have a non-profit purpose, making it a suitable form of legal entity for carrying out a scientific or research activity.
- 2.8.4 The members have equal rights, regardless of the amount of their financial participation in the association.
- 2.8.5 Most national legislations provide for the possibility of preferential tax treatment of the business.
- 2.8.6 Associations provide the possibility for carrying out of a business activity, related to the assigned goal, however in certain jurisdictions there are some restrictions on the amount of the association assets that could be assigned to such profit-making activities.
- 2.8.7 The absence of capital and shares of this entity can constitute an obstacle for changes in the membership of the entity.
- 2.8.8 Associations that receive public funding are regularly expected in different legal systems to comply with additional legal obligations and requirements, which represent an additional administrative burden for its members.

## 2.9 Belgian Association

### Non-profit association

- 2.9.1 A non-profit association is an association that does not conduct industrial or commercial operations, and does not aim to generate any tangible profit for its members.
- 2.9.2 A non-profit association has legal personality.
- 2.9.3 The founding members and the members who join the association after its creation do not have to bring contributions to the association. A non-profit association can be created by all the founding members signing the articles of association and these articles must be drafted in French, Dutch or German.
- 2.9.4 The registered office must be located in Belgium (but additional offices can be opened in other countries).
- 2.9.5 The creation of a non-profit association takes a minimum of 15 to 20 days.
- 2.9.6 There must be at least three founding members, irrespective of their nationality. A legal entity can also be a (founding) member.
- 2.9.7 Each year, the board of directors must prepare the annual accounts for the previous financial year and the budget for the next year, and submit these documents for the general meeting's approval. The form and content of these accounts, and the publication formalities, depend on the size of the non-profit association.

- 2.9.8** Non-profit organisations are usually exempt from corporate tax and only subject to the "tax on legal entities" (the tax on legal entities applies only to clearly determined income, which is only subject to a withholding tax or a specific contribution). In Belgium, a non-profit organisation is not considered to be a Belgian VAT taxpayer unless it carries out economic activities in Belgium.

### International non-profit association

- 2.9.9** An international non-profit association is largely the same as a non-profit association, and the same conditions and basic requirements apply as in relation to non-profit associations (except that incorporation requires a notarial deed and an approval by Royal Decree, and organisational freedom is broader).
- 2.9.10** A non-profit association is international if it is meant to further the realisation of a non-lucrative purpose of international relevance, provided that its purpose or activities do not contravene the law or public policy.
- 2.9.11** The creation of an international non-profit association must be authorised by Royal Decree. That authorisation is required for the recognition of its legal personality. This process usually takes two to three months.
- 2.9.12** The administration and corporate structure of an international non-profit association are more flexible than in a regular non-profit association, to facilitate the implementation of alternative governance schemes. Articles 49 and 53 of the Non-Profit Organisations Law refer to a "general body of direction" and a "management body" for the corporate governance of an international non-profit association. However, very few competences are expressly attributed to either body. These bodies usually take the form of a general meeting (general body of direction) and a board of directors (management body), but this dual corporate structure is not mandatory. The members can decide on the corporate organisation of the international non-profit association on incorporation or by amending the articles.
- 2.9.13** The Non-Profit Organisations Law does not impose any requirement related to the nationality of the members of the association or the members of the administration body.
- 2.9.14** Tax benefits similar to that of a non-profit association.

### **2.10 Foundations (General)**

- 2.10.1** The foundation form possesses a separate legal personality from its founders with limited liability of the founders. A Foundation has a non-profit purpose with the possibility for business activity and possibly qualifies for preferential tax treatment.

- 2.10.2 A Foundation is a pool of assets assigned for achieving a particular goal and does not have members. The founders may participate in the Foundation only through participation in its managing bodies.
- 2.10.3 The absence of membership relations complicates the acceptance of new participants – the entrance of new participants is subject to individual contracts between each new participant and the Foundation.
- 2.10.4 Similar to the Association, the Foundation can be subject to restrictions on the volume of business, probable application of the European procurement rules and additional requirements for public funding.

### **2.11 Belgian Foundations**

#### **Private Foundation**

- 2.11.1 A private Foundation is a legal entity created by one or several of its founders allocating personal or real assets for the achievement of non-profit purpose. It must not provide tangible benefits to the founder(s), the directors or other third persons, except when the distribution of funds to third persons is the purpose for which the Foundation has been created (Article 27, Non-Profit Organisations Law). There is no minimum capital to be contributed on incorporation.
- 2.11.2 A private Foundation can conduct commercial operations without distinction between principal and ancillary activities. The profits generated by the activities of the Foundation must be allocated to the implementation of the purposes of the Foundation, and not distributed to the founder(s) or directors.
- 2.11.3 The registered office of the private Foundation must be located in Belgium (but additional offices can be opened in other countries).
- 2.11.4 A board of directors, with at least three members, manages and represents the Foundation. The articles of association can create a protector or protection board for certain purposes (for example, appointing or screening future directors to ensure that their actions remain within the stated purpose and policy). There is no nationality requirement. Legal entities can be appointed as directors (but must designate an individual as permanent representative to perform the management duties on their behalf).
- 2.11.5 Foundations are eligible for tax benefits similar to that of Belgian Associations (see paragraph 2.9.8 above).

#### **Foundation of public interest**

- 2.11.6 The rules relating to private Foundations also apply to Foundations of public interest, apart from:

- 2.11.6.1** A Foundation of public interest must necessarily be intended to implement a purpose of a philanthropic, philosophical, religious, scientific, artistic, educational or cultural character.
- 2.11.6.2** The incorporation under that status or transformation of a private foundation into a Foundation of public interest is subject to authorisation by Royal Decree. In addition, some subsequent modifications of the articles of association require approval by Royal Decree. This procedure usually takes two to four months.

**3. EVALUATION CRITERIA FOR THE SELECTION OF A LEGAL STRUCTURE**

Draft criteria and associated weightings for choosing a suitable legal structure for MARINERG-i were identified in Deliverable 5.1 and presented at the Legal Structures Workshop meeting on 10 May 2017.

The criteria and weightings initially suggested by Bird & Bird (the "Draft Criteria") were as set out below:

<b>Criterion</b>	<b>Weighting</b>
Applicability for a European Research Infrastructure	3
Suitable governance	3
Compatibility with business model	3
Limited liability	2
Recognised legal structure	2
Non-profit status	2
Ownership arrangements	2
Complexity/time for implementation	2
Tax status	1
Personnel status	1

**Table 1: Draft Criteria for the evaluation of legal forms**

As identified in paragraph 1 of this Deliverable 5.2, a discussion was undertaken at the Legal Structures Workshop meeting during which each criterion was reviewed to decide whether any amendments should be made to Table 1 and whether the weightings given to each criterion should be changed. The final criteria and weightings decided upon during the meeting are set out in Table 2 below (the "Final Criteria").

<b>Criterion</b>	<b>Weighting</b>

Applicability for a European Distributed Research Infrastructure	3
Governance	3
Compatibility with business and financial model	3
Limited liability	3
Status and recognition	3
Recognised legal structure	2
Required non-profit status	2
Ownership	2
Implementation complexity/timeframe	2
Tax status	2
Membership for non-EU countries	3

**Table 2: Final Criteria for the evaluation of legal forms**

As set out in paragraph 1 above, once Table 2 was finalised, an evaluation process was carried out to evaluate each of the legal structures detailed at paragraph 2 above against each of the criteria in Table 2. In doing so, each criterion was given a score ranging from 1 to 3; 1 being the lowest and meaning "less favourable", 2 meaning "neutral" and 3 being the highest and meaning "favourable".

Further information is provided below, setting out how the Final Criteria were identified.

**3.1 Applicability for a European Distributed Research Infrastructure**

This criterion was amended as a result of the discussion at the Legal Structures Workshop meeting from "Applicability for a European Research Infrastructure", to read "Applicability for a European Distributed Research Infrastructure". The participants agreed that this criterion was essential for the evaluation process in order to help identify whether a legal structure would allow for the RI to be trans-European in nature. Due to its importance, the mutual decision was to maintain the highest weighting of 3 points for this criterion.

**3.2 Governance**

Following the discussion, the draft criterion of "Suitable Governance" was amended to "Governance". The participants agreed that the governance criterion would include all aspects of governance relating to the legal structure, including on-going compliance and any applicable management requirements. The highest weighting of 3 was maintained for this criterion.

### **3.3 Compatibility with business and financial model**

The outcome of the discussion in relation to the draft criterion of "Compatibility with business model" was that it should be broadened to include a financial aspect. It was therefore amended to read "Compatibility with business and financial model". The participants agreed that the evaluation process would need to adequately consider whether a legal structure would not only be compatible with the RI's business model but whether it would allow for the RI to receive its funding and not impose any arduous capital requirements when establishing the RI as a legal entity. Overall the RI has a prescribed business and financial model and it is therefore important to select a legal entity which would allow it to implement those desired models. It was deemed appropriate by the participants that this criterion continued to be assigned a weighting of 3 points.

### **3.4 Limited liability**

The consensus was that the weighting of this criterion should be increased from 2 points (as set out in the Draft Criteria) to 3 points. The reason for this increased weighting is because the participants viewed the liability of the different entities involved in the RI as a key point of consideration when deciding which legal structure to opt for.

### **3.5 Status and recognition**

The criterion "Personnel status", (which was included in the Draft Criteria), was removed and the criterion of "Status and recognition" was added. It was decided to include this criterion in order to highlight the importance of MARINERG-i choosing a legal structure under which it will be recognised as a legal entity within the European Union ("EU") and with the European Commission. Additionally, having the appropriate recognition and status would be conducive to the RI receiving recognition outside of Europe as a research infrastructure. This was considered to be an important criterion by the participants in the discussion, and received a weighting of 3 points.

### **3.6 Recognised legal structure**

"Recognised legal structure" as a criterion remained unchanged in both description and weighting following the outcome of the discussion. It was agreed that this criterion was to be evaluated with consideration for the ability of the legal structure to engage personnel and to enter into contracts with third parties (both within and outside the EU).

### **3.7 Required non-profit status**

"Non-profit status" was amended in its description to read "Required non-profit status". This clarification was necessary because the business model is premised



on the distributed research infrastructure having non-profit status. The weighting of 2 was maintained for this criterion.

### **3.8 Ownership**

The draft criteria included "Ownership arrangements" which was amended to read "Ownership" as a result of the discussions at the Legal Structures Workshop meeting. A weighting score of 2 was deemed appropriate and so this remained unchanged from the Draft Criteria.

### **3.9 Implementation complexity/timeframe**

The Draft Criteria included a "Complexity/time for implementation" criterion, which was amended to "Implementation complexity/timeframe". This criterion was considered to be a necessary part of evaluating the legal options available to the RI as there was a need to reflect on the ease with which the legal entity could be set-up, including the background documents which would be required in order to implement the distributed infrastructure, such as any agreements between the participating member parties relating to liability. It was also considered important that the process of establishing the chosen legal entity was not lengthy. The political input required for some of the legal structures available was discussed, in particular with regard to how this could potentially slow the incorporation process, which would not be aligned with the RI's goals. It was decided to maintain the weighting score of 2 which was given to this criterion in the Draft Criteria.

### **3.10 Tax status**

The "Tax status" criterion was given an increased weighting from 1 to 2 as a result of the discussion at the meeting. The participants viewed the RI's ability to benefit from a favourable tax status to be an important criterion for the process of evaluating the appropriate legal structure for the RI.

### **3.11 Membership for non-EU countries**

This criterion was added as an additional criterion to the Draft Criteria set out in Deliverable 5.1. The meeting concluded that there was a high importance associated with establishing a flexible structure for the RI which would allow participation by non-EU countries and therefore allow the RI to achieve more of its objectives and both offer and acquire services from International infrastructures in the future. There was a consensus that this criterion should be given a weighting score of 3.

## **4. OUTCOME OF THE EVALUATION**

### **4.1 European Research Infrastructure Consortium (ERIC)**

**4.1.1** The ERIC received a favourability percentage of 93% on the evaluation matrix shown at Appendix 1 below and was the chosen legal entity for MARINERG-i by a consensus of those attending the Legal Structures Workshop meeting as well as the other members of the RI who were not present at the meeting but were later consulted on the evaluation outcome.

- 4.1.2** The ERIC was the most favourable legal entity due to it being awarded the highest score of 3 for each of the most heavily weighted criterion.
- 4.1.3** 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<sup>31</sup>. It was important to the RI to have a legal entity which provided for limited liability and protected its members personally. The ERIC achieves this aim by having its own legal personality and the ability to limit liability. This criterion was therefore given a 3 for the ERIC.
- 4.1.4** The ERIC's legal personality has the benefit of being recognised in all EU MSs. Furthermore, non-EU MSs and intergovernmental organisations can also be members of an ERIC, although provisions would need to be made by each relevant non-EU MS to ensure that the ERIC: (i) would have legal personality and legal capacity in their country; (ii) would be governed by EU law; and (iii) would be exempt from VAT, excise duties and public procurement rules in their country. The ability for there to be members of the RI from non-EU countries was an important factor for the RI when evaluating the options available, and the ERIC's flexibility in this regard resulted in this criterion being awarded the highest score of 3.
- 4.1.5** As more fully described in paragraph 2.6.7 above, the procedure for setting up an ERIC involves an application to the Commission<sup>32</sup>, which assesses whether or not the proposed RI meets the requirements of an ERIC as described in the ERIC Regulation<sup>33</sup>. Applicants are then required to submit a formal request to the Commission, which will allow the Commission to prepare its decision setting up the ERIC<sup>34</sup>. The fact that an ERIC cannot be set up by its members autonomously means that the implementation time frame is harder to predict. It is for this reason that the ERIC scored a 2 for the "Implementation complexity/timeframe" criterion.
- 4.1.6** 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. This means that an ERIC would have the flexibility to adapt to the specific requirements of the RI, and would therefore allow compatibility with the RI's Business and Financial model which was a key consideration for the RI. The ERIC was consequently given a score of 3 for this criterion.
- 4.1.7** The ERIC provides for suitable governance which was another heavily weighted criterion in the evaluation process. In particular ERICs provide for: (i) an assembly of members as the body having full decision-making

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<sup>31</sup> Article 14(2), Council Regulation (EC) No 723/2009 of 25 June 2009 on the Community legal framework for a European Research Infrastructure Consortium (ERIC).

<sup>32</sup> Article 5, Council Regulation (EC) No 723/2009 of 25 June 2009 on the Community legal framework for a European Research Infrastructure Consortium (ERIC).

<sup>33</sup> Council Regulation (EC) No 723/2009 of 25 June 2009 on the Community legal framework for a European Research Infrastructure Consortium (ERIC).

<sup>34</sup> Article 6, Council Regulation (EC) No 723/2009 of 25 June 2009 on the Community legal framework for a European Research Infrastructure Consortium (ERIC).

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<sup>35</sup>. Accordingly the ERIC was given a score of 3 for this criterion.

## **4.2 International Agreements**

- 4.2.1** International Agreements received an 80% favourability percentage in the evaluation matrix shown at Appendix 1 below.
- 4.2.2** Whilst International Agreements achieved the second highest score, behind the ERIC, there were a few key areas of the evaluation for which the relevant criterion was awarded a slightly lower score of 2, rather than the 3s which were awarded to the ERIC, as described in paragraphs 4.2.3 to 4.2.5 below.
- 4.2.3** Whilst the International Agreement structure can be flexible and is tailor-made in how it is set-up, once it is established the entity would be rigid by nature, in that there would be a lack of flexibility for the organisation to change and adapt to developments to the extent that amendments to the International Agreement would be necessary. This is in conflict with the goals of the RI and meant that the Compatibility with Business and Financial model criterion scored lower than the ERIC for International Agreements.
- 4.2.4** In addition, the participants discussed examples of research infrastructures similar to MARINERG-i which have been set up using the legal form and status granted by International Agreement. One example is the European Molecular Biology Laboratory, which was founded in 1974, more than 10 years after the idea of establishing an international laboratory for molecular biology was expressed and discussions initiated<sup>36</sup>. The participants expressed concern that the nature of International Agreements and the need for these to be ratified at Government level makes the duration of the setting up process unpredictable and therefore less appealing than some of the other legal structure options now available to MARINERG-i, some of which were not yet available to the European Molecular Biology Laboratory when discussions started in 1962.
- 4.2.5** Whilst International Agreements attract the sort of status and recognition sought after by the RI and was awarded a score of 3 for this criterion, there were considered to be no particular advantages by opting for an International Agreement in terms of Governance or limiting liability for members and so for these areas it was awarded a neutral score of 2 for each. These were both heavily weighted criteria for the evaluation exercise and so the result was International Agreements as an option produced a lower favourability percentage than the ERIC.

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<sup>35</sup> Article 12, Council Regulation (EC) No 723/2009 of 25 June 2009 on the Community legal framework for a European Research Infrastructure Consortium (ERIC).

<sup>36</sup> European Molecular Biology Laboratory website ([https://www.embl.de/aboutus/general\\_information/history/index.html](https://www.embl.de/aboutus/general_information/history/index.html)).

### 4.3 European Joint Undertaking (JU)

- 4.3.1 Like the International Agreement, the European JU approach received an 80% favourability percentage in the evaluation matrix shown at Appendix 1 below.
- 4.3.2 In most areas the JU received similar scores to the ERIC. However, as with the International Agreements the JU was awarded a lower score of 2 in key, heavily weighted areas of the criteria. This affected the overall percentage and left the ERIC with the higher score of the two options, as described below.
- 4.3.3 Membership for non-EU countries, Compatibility with Business and Financial Model and Limited Liability were the key areas where the JU was seen to offer no particular advantage compared to the ERIC.
- 4.3.4 It was also felt by the participants at the Legal Structures Workshop meeting that an important factor to consider with the JU was that the Commission would always be a founding member and would be involved in the decision making processes. Whilst this was not viewed as a negative it was decided that compared to the ERIC it offered no real advantages when assessing the aims and objectives of the RI.

### 4.4 Limited Companies

- 4.4.1 The limited company received a 76% favourability percentage in the evaluation matrix shown at Appendix 1 below.
- 4.4.2 Whilst limited companies scored well for two of the key areas, Compatibility with Business and Financial Model and Membership for non-EU countries, it was awarded a score of 1 for another two important areas: Status and Recognition and Tax status (which each have a weighting of 2). Furthermore it received a neutral score of 2 for both: (1) Applicability for European Distributed Research Infrastructure; and (2) Governance.
- 4.4.3 If MARINERG-i were to elect to establish itself as a limited company it would offer no special status to the RI and not be easily recognised within the research community. This was the rationale behind the low score of 1 being awarded for this criterion.
- 4.4.4 In addition to scoring a 1 for Status and Recognition limited companies were also awarded a score of 1 for the Tax Status criterion. This was because a limited company is subject to different tax treatment in different jurisdictions and as limited companies are not specifically designed for research infrastructures this legal entity would be at a disadvantage in relation to the tax criterion.
- 4.4.5 A limited company has a separate legal personality from its members and its shareholders' liability is limited in proportion to the amount of their contribution to the capital (no shareholder bears personal responsibility for the entity's liabilities). This in addition to limited

companies being well recognised legal structures meant that for those aspects of the criteria it was awarded the highest score of 3.

### **4.5 Associations (General)**

- 4.5.1 Associations received a 70% favourability percentage in the evaluation matrix shown at Appendix 1 below.
- 4.5.2 Whilst Associations are easier and faster to establish than an ERIC resulting in a higher score than the ERIC for the Implementation complexity/timeframe criterion, it scored a number of 2s and one score of 1 in heavily weighted areas of the criteria, which resulted in the overall score for Associations being reduced.
- 4.5.3 There is no special status associated with this type of entity and by a consensus at the Legal Structures Workshop meeting it was decided that the RI would be disadvantaged in relation to Status and Recognition if it were to elect to establish itself as an Association. It was therefore awarded a score of 1 for this criterion.
- 4.5.4 Associations were awarded a neutral score of 2 for the following criterion: (1) Applicability for European Distributed Research Infrastructure; (2) Governance; and (3) Limited Liability. All three areas were considered key considerations in the evaluation process and assigned the highest weighting of 3. However, by selecting an Association as its legal entity the RI felt that it would be offered no real advantage or disadvantage in these areas and as a result the score of 2 was awarded. This further reduced its overall score compared to the ERIC.
- 4.5.5 Lastly, whilst an Association was seen to be compatible with the RI's business and financial models and would allow for membership from non-EU countries (and therefore was awarded a 3 for this criterion), Associations was viewed as providing a poor tax status for the RI and this criterion was given a score of 1.

### **4.6 European Grouping of Territorial Cooperation (EGTC)**

- 4.6.1 The EGTC received a 70% favourability percentage in the evaluation matrix shown at Appendix 1 below.
- 4.6.2 The EGTC scored consistently lower scores than the ERIC in the evaluation process, in particular in the heavily weighted areas, which then affected the EGTC's overall score.
- 4.6.3 The EGTC was awarded a score of 1 for the Applicability for European Distributed Research Infrastructure because it is designed primarily to facilitate cross-border cooperation amongst EU MS, and is therefore not appropriate for MARINERG-i. An example of an EGTC is Archimed, which is a cooperation structure among Mediterranean islands (Greece, Cyprus,

Italy and Spain) designed to "enhance the interests of the people living in the Mediterranean islands at European level"<sup>37</sup>.

- 4.6.4 It was also awarded a neutral score of 2 (lower than the ERIC) in other heavily weighted areas, including Governance, Compatibility with Business and Financial Model and Status and Recognition.
- 4.6.5 It was discussed how the purpose of an EGTC is effectively to promote inter-regional activities and is therefore not overly suited to research bodies such as MARINERG-i. An EGTC would not offer the type of status that the RI is looking for within the global research community, nor would it likely be able to conform to the business and financial model. It was for these reasons that the EGTC was awarded a score of 2 in these areas.
- 4.6.6 In terms of governance the EGTC also received a score of 2. It was seen to offer no real advantages or disadvantages in this respect, in contrast to the ERIC.
- 4.6.7 Whilst the EGTC, did score 3 in two heavily weighted areas: Limited Liability and Membership for non-EU countries it was not considered to be advantageous to the RI in a number of other key areas of the criteria. Overall, despite being a flexible structure it was not considered to be suitable for a fully international RI.

### 4.7 Foundations (General)

- 4.7.1 Foundations received a 68% favourability percentage in the evaluation matrix shown at Appendix 1 below.
- 4.7.2 Similarly to the EGTC the evaluation process concluded that a Foundation should score the maximum 3 points in only two of the key criteria, which were Compatibility with Business and Financial Model and Membership for non-EU countries.
- 4.7.3 Foundations were considered to be very similar to Associations in terms of pros and cons (see paragraph 4.5 above).
- 4.7.4 However, Foundations came out with a lower overall score than Associations as it scored lower for the Ownership criterion. The reason behind this is that a Foundation does not have members. Although founders of the Foundation may participate in the Foundation through participation in its managing bodies, it is a pool of assets assigned for achieving a particular goal. This was seen as a disadvantage of the Foundation's structure when looking at the goals of the RI and how it wishes to operate internally to achieve these goals. The Ownership criterion was therefore awarded a 1.

### 4.8 European Economic Interest Grouping (EEIG)

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<sup>37</sup> <https://portal.cor.europa.eu/egtc/CoRActivities/Pages/Archimed.aspx>

- 4.8.1 The EEIG received a 58% favourability percentage in the evaluation matrix shown at Appendix 1 below.
- 4.8.2 Whilst the EEIG was considered to be a flexible structure it did not score above a 2 for any of the key criterion. One of the most prominent issues was that organisations from non-EU MSs are not able to be members of an EEIG. Whilst it was accepted that due to its legal capacity the EEIG could contract with non-EU MSs, it was decided that this was a certain disadvantage for the RI and ultimately would impact on its ability to operate as a European Distributed Research Infrastructure. Secondly, members of the EEIG have unlimited, joint and several liability. This was a major concern for the participants at the Legal Structures Workshop meeting as they felt that this is something that may deter other members from joining the RI. It was therefore decided to award a score of 1 for all of these heavily weighted areas of the criteria.
- 4.8.3 It was its performance in these key areas that resulted in the EEIG being the second least favourable option open to the RI.
- 4.8.4 The participants briefly considered examples of EEIGs (namely European Milk Recording, Euripta, European Network for Economic Cooperation and Development and Eyes-Road), however the participants were of the view, when looking at the allocated scores in Appendix 1, that an EEIG would not be the most appropriate legal form when compared to the other options available.

### 4.9 Societas Europaea (SE)

- 4.9.1 The SE received a 50% favourability percentage in the evaluation matrix shown at Appendix 1 below.
- 4.9.2 The SE was considered to be a well-recognised legal structure and was awarded a score of 3 for this criterion. However, in all other areas it was awarded either a neutral score of 2, in that it was seen to offer no real advantage or disadvantage to the RI, or a score of 1. In four of the six key areas of the criteria the SE scored a 1, resulting in it being considered as the least favourable option available to MARINERG-i.
- 4.9.3 The SE Regulation sets out very specific structure and governance requirements<sup>38</sup>, which may be considered quite onerous and administrative, and for this reason it was awarded a low score in the areas of Governance and Compatibility with Business and Financial Model.
- 4.9.4 It was discussed at the Legal Structures Workshop meeting that the SE would not suitably meet the needs of a European RI such as MARINERG-i, as it primarily suits large, established companies. The SE was consequently awarded a score of 1 for the Applicability for European

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<sup>38</sup>Articles 38 – 62, Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE).

Distributed Research Infrastructure criterion, which was a key consideration for the RI in this evaluation process.

- 4.9.5** The SE Regulation does not cover the tax treatment of an SE and, therefore, an SE will be subject to the tax laws of the EU MS in which it is registered, and therefore treated in the same way as a multi-national company (whether large or small). The SE as a legal entity would not therefore provide preferential tax status to the RI.



**APPENDIX ONE: EVALUATION OUTCOME**

**Evaluation of Legal Structures – Scores allocated**

<b>Criterion</b>	<b>International Agreements</b>	<b>EEIG</b>	<b>SE</b>	<b>EGTC</b>	<b>European JU</b>	<b>ERIC</b>	<b>Limited Company</b>	<b>Association</b>	<b>Foundation</b>
Applicability for European Distributed Research Infrastructure	3	1	1	1	3	3	2	2	2
Governance	2	2	1	2	3	3	2	2	2
Compatibility with Business and Financial Model	2	2	1	2	2	3	3	3	3
Limited liability	2	1	2	3	2	3	3	2	2
Status and Recognition	3	2	2	2	3	3	1	1	1
Recognised legal structure	3	2	3	2	3	3	3	2	2
Required non-profit status	2	3	1	3	2	3	2	2	2
Ownership	2	2	2	1	2	2	2	2	1
Implementation complexity/timeframe	1	2	2	2	2	2	3	3	3
Tax status	3	2	1	2	2	2	1	1	1
Membership for non-EU countries	3	1	1	3	2	3	3	3	3
<b>Total score</b>	<b>67</b>	<b>49</b>	<b>42</b>	<b>59</b>	<b>67</b>	<b>78</b>	<b>64</b>	<b>59</b>	<b>57</b>
<b>Favourability Percentage</b>	<b>80%</b>	<b>58%</b>	<b>50%</b>	<b>70%</b>	<b>80%</b>	<b>93%</b>	<b>76%</b>	<b>70%</b>	<b>68%</b>

**APPENDIX TWO: SWOT ANALYSIS**

**International Agreements**

<p><b>Strengths</b></p> <ul style="list-style-type: none"> <li>• The international agreement is a tailor-made instrument that can be designed to fit each different RI (i.e. members can decide to apply a cross-waiver of liability), and is therefore very flexible in the formation stages.</li> <li>• The international RI will benefit from tax and procurement regulation exemptions.</li> <li>• It will have separate legal capacity allowing it to contract and acquire assets.</li> <li>• An international agreement has a certain level of prestige and status associated with it.</li> </ul>	<p><b>Weaknesses</b></p> <ul style="list-style-type: none"> <li>• Requires a time consuming process of negotiation to get the agreement establishing the international RI signed by the MSs, which will then each individually need to ratify the agreement.</li> <li>• The membership is limited to States and other international organisations, which could pose a problem should potential members be of a different nature.</li> </ul>
<p><b>Opportunities</b></p> <ul style="list-style-type: none"> <li>• An international agreement can assist with political momentum.</li> <li>• It will be able to own its intellectual property.</li> <li>• No required template to follow.</li> <li>• They have a level of prestige and status associated with them.</li> </ul>	<p><b>Threats</b></p> <ul style="list-style-type: none"> <li>• The set-up costs are high and this is therefore an expensive route.</li> <li>• An international agreement will take a long time to set-up.</li> <li>• There is a lack of flexibility for the organisation to change and adapt to developments; once they are set-up, international agreements are rigid in their structure.</li> <li>• This structure is more relevant to extensive projects where there is high state involvement.</li> <li>• There needs to be political will in all members to drive this through and it is questionable whether this project would be given priority by States over other projects.</li> </ul>

**European Economic Interest Grouping**

<p><b>Strengths</b></p> <ul style="list-style-type: none"> <li>• A grouping can be established by subjects with a different legal status: legal persons, private or public entities, self-employed persons, chambers of commerce etc.</li> <li>• Depending on which EU MS an EEIG is registered in, it may have legal capacity.</li> <li>• It is a very flexible and unbureaucratic legal instrument. Its rules can be decided upon by the members in observance of a few guidelines fixed in the European regulation<sup>39</sup>.</li> <li>• An EEIG can be founded with or without assets, investment or know-how transfer.</li> <li>• The members of an EEIG go on carrying out their own activities autonomously. They maintain the activities they ran before and besides obtain new business opportunities.</li> </ul>	<p><b>Weaknesses</b></p> <ul style="list-style-type: none"> <li>• The purpose of an EEIG is restricted in its objectives as an EEIG’s activities must be ancillary to the main economic activities of its members.</li> <li>• Organisations from non-EU MSs may not become members of an EEIG.</li> <li>• Fiscal transparency regime: any profits, losses or gains are distributed between the members according to their shares. The members are then taxed according to the national law in which the EEIG is registered in the normal way.</li> <li>• The EEIG has not obtained legal personality in all MSs.</li> <li>• EEIGs are subject to EU and/or domestic competition laws in the same way as any other organisation.</li> <li>• There are no special grants available specifically for EEIGs.</li> </ul>
<p><b>Opportunities</b></p> <ul style="list-style-type: none"> <li>• It is an existing legal structure which has been around for over 30 years.</li> <li>• EEIGs can bid for EU or Government funds.</li> </ul>	<p><b>Threats</b></p> <ul style="list-style-type: none"> <li>• Unlimited, joint and several liability for members.</li> <li>• No consistency to how it is operated over different MSs, for example tax and employment issues will differ depending on which EU MS the EEIG is registered in.</li> </ul>

<sup>39</sup> Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Interest Economic Grouping (EEIG)

**Societas Europaea**

<p><b>Strengths</b></p> <ul style="list-style-type: none"> <li>• The SE is a European legal entity with legal personality.</li> <li>• It has high acceptance by the EU MSs.</li> </ul>	<p><b>Weaknesses</b></p> <ul style="list-style-type: none"> <li>• Requires a combination of European and national corporate laws and can therefore be a complex and expensive structure to set up.</li> <li>• It is designed for established companies with economic orientation.</li> <li>• SE has complex establishment and structure requirements, as well as specific governance requirements.</li> <li>• An SE is subject to the tax regime of the national legislation in the EU MS in which the SE is registered, and is subject to taxes and charges in all EU MSs in which it has administrative centres.</li> <li>• A minimum subscribed capital of EUR 120,000 is necessary.</li> <li>• Designed for companies with an economic orientation (i.e. companies operating in the private sector).</li> </ul>
<p><b>Opportunities</b></p> <ul style="list-style-type: none"> <li>• It is a well-established legal entity.</li> <li>• It has limited liability for members.</li> </ul>	<p><b>Threats</b></p> <ul style="list-style-type: none"> <li>• It is treated as a public limited company.</li> </ul>

**European Grouping of Territorial Cooperation**

<p><b>Strengths</b></p> <ul style="list-style-type: none"> <li>• It benefits from its own legal personality.</li> <li>• Various types of public bodies can be members of an EGTC.</li> <li>• There are no capital requirements.</li> <li>• Flexible structure (two organs required under the EGTC Regulation but Statutes can provide for more organs).</li> </ul>	<p><b>Weaknesses</b></p> <ul style="list-style-type: none"> <li>• Its purpose is very limited, and arguably does not fit with the requirements and objectives of an RI.</li> <li>• Requires the approval of the relevant EU MS of each prospective member before it can be set up.</li> <li>• Only third countries and OCTs neighbouring an EU MS that is a member to the EGTC are able to be part of the EGTC.</li> </ul>
<p><b>Opportunities</b></p> <ul style="list-style-type: none"> <li>• The EGTC is unique in the sense that it enables public authorities of various MSs to team up and deliver joint services, without requiring a prior international agreement to be signed and ratified by national parliaments.</li> </ul>	<p><b>Threats</b></p> <ul style="list-style-type: none"> <li>• Members' liability is proportionate to the value of their contribution to the EGTC – this could reduce incentives for members to contribute to the project.</li> </ul>

**European Joint Undertaking**

<p><b>Strengths</b></p> <ul style="list-style-type: none"> <li>• One advantage of the JU is that the statutes or the articles of association are not pre-defined anywhere, leaving a large amount of freedom to its founding members.</li> <li>• It is flexible by nature.</li> <li>• Governance structure.</li> <li>• It has a certain level of prestige and status associated with it.</li> </ul>	<p><b>Weaknesses</b></p> <ul style="list-style-type: none"> <li>• The founding procedure of JUs is complex and relies on the initiative of the Commission and a case-by-case decision by the Council</li> <li>• No clear advantage over other legal structures of having the European Commission as a founding member.</li> <li>• High level of political buy-in is required.</li> </ul>
<p><b>Opportunities</b></p> <ul style="list-style-type: none"> <li>• High degree of political involvement due to the Commission being a founding member.</li> </ul>	<p><b>Threats</b></p> <ul style="list-style-type: none"> <li>• No clear advantage over other legal structures of having the Commission involved in the decision making process for the JU.</li> </ul>

**European Research Infrastructure Consortium**

<p><b>Strengths</b></p> <ul style="list-style-type: none"> <li>• An ERIC has a legal personality and full legal capacity recognised in all EU MSs.</li> <li>• ERICs have been tailored to EU research infrastructures.</li> <li>• Unlike international organisations, an ERIC does not need any ratification at EU or national level (other than the Commission decision setting up the ERIC) at any stage of its establishment.</li> <li>• Possible membership of non-EU MSs (associated countries and third countries).</li> </ul>	<p><b>Weaknesses</b></p> <ul style="list-style-type: none"> <li>• Private entities wishing to be a member of an ERIC will need to be explicitly granted such a mission through a decision by a public sector body.</li> <li>• An ERIC is EU focused and could therefore discourage non-EU MSs involvement because: (1) underlying role of the Commission; (2) application of EU law; (3) application of the jurisdiction of the ECJ; and (4) non-EU MSs need to ensure that the ERIC is granted the same benefits in their legal system as it is in the EU.</li> </ul>
<p><b>Opportunities</b></p> <ul style="list-style-type: none"> <li>• Liability is limited for members to their contributions (financial or in-kind).</li> <li>• Flexible liability regime for members.</li> <li>• It is not wholly restricted to purely non-economic activities.</li> <li>• ERICs benefit from the same treatment as international organisations in relation to VAT, excise duty and compliance with public procurement rules.</li> <li>• An ERIC can have operations and sites in any country in the world (although the HQ/statutory seat has to be in the EU).</li> <li>• There are no prescribed "Statutes" (i.e. articles of association) therefore the members have freedom to draft these, provided that they cover as a minimum those points listed in Article 10 of the ERIC Regulation.</li> </ul>	<p><b>Threats</b></p> <ul style="list-style-type: none"> <li>• There is a need for involvement from the host MSs as they will need to make a declaration recognising the ERIC.</li> <li>• There is a risk that the ERIC will not be recognised as a legal personality by a non-EU MS.</li> <li>• An ERIC requires the approval of the Commission (although the Commission will not be involved in the ERIC after approval has been given).</li> <li>• High level of political buy-in is required.</li> <li>• The Commission needs to approve the Statutes of the ERIC.</li> </ul>

**Limited Company**

<p><b>Strengths</b></p> <ul style="list-style-type: none"> <li>• A separate legal personality from its members.</li> <li>• Limited liability of the shareholders, who are responsible only in proportion to the amount of their contribution to the capital.</li> <li>• Equal treatment of the shareholders, who have equal rights, depending solely on their participation in the capital.</li> <li>• Open funding model, which allows both cash and in kind contributions of the shareholders that formed the company's capital.</li> <li>• Clear organisation structure – supreme body composed of all shareholders and managing body (individual or collective) elected by them.</li> <li>• Free transfer of shares.</li> <li>• Process to establish a limited company is quick and easy.</li> </ul>	<p><b>Weaknesses</b></p> <ul style="list-style-type: none"> <li>• Must have at least one director who is a natural person.</li> <li>• High level of regulatory compliance.</li> <li>• Not specifically designed for research infrastructures.</li> <li>• There is no special status associated with a limited company.</li> </ul>
<p><b>Opportunities</b></p> <ul style="list-style-type: none"> <li>• Flexibility of purpose and goals – possibility in some jurisdictions to establish non-profit limited companies.</li> </ul>	<p><b>Threats</b></p> <ul style="list-style-type: none"> <li>• Tax treatment may vary in different jurisdictions.</li> <li>• Additional regulations may apply where limited company is established for charitable/non-profit purposes.</li> </ul>



**Foundations - General**

<p><b>Strengths</b></p> <ul style="list-style-type: none"> <li>• Separate personality from its founders.</li> <li>• Limited liability of the founders.</li> </ul>	<p><b>Weaknesses</b></p> <ul style="list-style-type: none"> <li>• Founders may participate in the Foundation only through participation in its managing bodies.</li> <li>• The Foundation can be subject to restrictions on the volume of business.</li> <li>• Many different variations depending on the country of origin.</li> <li>• No special status is associated with these entities.</li> <li>• Foundations can be quite bureaucratic.</li> <li>• It is difficult to use Foundations as a stepping stone should the RI wish to evolve in the future.</li> </ul>
<p><b>Opportunities</b></p> <ul style="list-style-type: none"> <li>• Non-profit purpose and possibility for business activity.</li> <li>• Possibility for preferential tax treatment.</li> </ul>	<p><b>Threats</b></p> <ul style="list-style-type: none"> <li>• Entrance of new participants is subject to individual contracts between each new participant and the Foundation.</li> <li>• Possible application of the European procurement rules and additional requirements for public funding.</li> <li>• Can be quite bureaucratic in some countries.</li> </ul>

**Belgian Foundation**

<p><b>Strengths</b></p> <ul style="list-style-type: none"> <li>• Separate personality from its founders.</li> <li>• Limited liability of the founders.</li> <li>• Can conduct commercial operations without distinction between principal and ancillary activities.</li> </ul>	<p><b>Weaknesses</b></p> <ul style="list-style-type: none"> <li>• The registered office of the private Foundation must be located in Belgium.</li> <li>• The Foundation can be subject to restrictions on the volume of business.</li> </ul>
<p><b>Opportunities</b></p> <ul style="list-style-type: none"> <li>• There is no nationality requirement for the directors.</li> <li>• Possibility for preferential tax treatment.</li> </ul>	<p><b>Threats</b></p> <ul style="list-style-type: none"> <li>• Entrance of new participants is subject to individual contracts between each new participant and the Foundation.</li> <li>• Possible application of the European procurement rules and additional requirements for public funding.</li> </ul>

**Associations - general**

<p><b>Strengths</b></p> <ul style="list-style-type: none"> <li>• It is a separate legal entity from its members.</li> <li>• Limited liability of the members, responsible only to the level of their contribution.</li> <li>• Non-profit purpose, which makes it a suitable form of legal entity for carrying out a scientific or research activity.</li> <li>• Equal treatment of the members, who have equal rights, regardless of the amount of their financial participation in the Association.</li> </ul>	<p><b>Weaknesses</b></p> <ul style="list-style-type: none"> <li>• Even if an Association can carry out commercial activities, in certain jurisdictions there are some restrictions on the amount of the Association's assets that could be assigned to such profit-making activities.</li> <li>• The absence of capital and shares of this entity can constitute a significant obstacle for changes in the membership of the entity – new members are accepted only by decision of the governing bodies.</li> <li>• Many different variations depending on the country of origin.</li> <li>• No special status is associated with these entities.</li> <li>• Associations can be quite bureaucratic.</li> <li>• It is difficult to use Associations as a stepping stone should the RI wish to evolve in the future.</li> </ul>
<p><b>Opportunities</b></p> <ul style="list-style-type: none"> <li>• Possibility for preferential tax treatment of the business in most national legislations.</li> <li>• Possibility for carrying out of a business activity, related to the assigned goal.</li> </ul>	<p><b>Threats</b></p> <ul style="list-style-type: none"> <li>• The existence of possible additional requirements related to public funding is another main disadvantage of this legal form. Associations that receive public funding are regularly expected in different legal systems to comply with additional legal obligations and requirements, which represent an additional administrative burden for its members.</li> <li>• Can be quite bureaucratic in some countries.</li> </ul>

**Belgian Associations**

<p><b>Strengths</b></p> <ul style="list-style-type: none"> <li>• A non-profit Association has legal personality.</li> <li>• The founding members and the members who join the Association after its creation do not have to bring contributions to the Association.</li> <li>• The creation of a non-profit Association takes a minimum of 15 to 20 days.</li> <li>• There must be at least three founding members, irrespective of their nationality.</li> <li>• The administration and corporate structure of an international non-profit Association are more flexible than in a regular non-profit Association, to facilitate the implementation of alternative governance schemes.</li> </ul>	<p><b>Weaknesses</b></p> <ul style="list-style-type: none"> <li>• The registered office must be located in Belgium.</li> </ul>
<p><b>Opportunities</b></p> <ul style="list-style-type: none"> <li>• Non-profit organisations are usually exempt from corporate tax and only subject to the "tax on legal entities". A non-profit organisation is not considered to be a Belgian VAT taxpayer unless it carries out economic activities in Belgium.</li> <li>• An international non-profit Association is largely the same as a non-profit Association, and the same conditions and basic requirements apply as in relation to non-profit Associations.</li> </ul>	<p><b>Threats</b></p> <ul style="list-style-type: none"> <li>• A non-profit Association is an association that does not conduct industrial or commercial operations, and does not aim to generate any tangible profit for its members.</li> </ul>