

EUROPEAN RESEARCH INFRASTRUCTURE CONSORTIUMS AND ECONOMIC ACTIVITY: TO WHAT EXTENT (IF ANY) SHOULD ERICS BE SUBJECTED TO RULES THAT RESTRICT THEIR ECONOMIC ACTIVITY?

ARNLJOTUR ASTVALDSSON*

In 2009, the European Union introduced the European Research Infrastructure Consortium (ERIC) to provide a legal framework for organisations in which EU Member States and other countries could collaborate on the establishment and operation of research infrastructures. Today, 30 ERICs have been set up and operate with headquarters in various European countries. As ERICs' primary task is to conduct research activities, they are subject to rules limiting their ability to engage in economic activity. This article examines these rules in light of recent Commission statements regarding the concept of economic activity under the regulation that established the ERIC (the ERIC Regulation) and offers suggestions for amending the regulation's rules on economic activity.

1 INTRODUCTION

This article discusses the rules governing European Research Infrastructure Consortia (ERICs), which are entities that operate within a legal form established under European Union (EU) law by Council Regulation (EC) No 723/2009 of 25 June 2009 (the ERIC Regulation).¹ The article focuses on rules governing the economic activity of ERICs.

In 2023, the Commission published its third report on the application of the ERIC Regulation (the Third ERIC Report), addressing 'remaining challenges and potential solutions for the effective financing and operation of ERICs'.² One key challenge identified was how ERICs define their activities, particularly economic activity, which had also been briefly addressed by the Commission in its first and second reports on the ERIC Regulation.³ The third report provided the following considerations on this matter:

*Assistant Professor (lektor) at Reykjavik University (Iceland) and lecturer at Lund University (Sweden).

¹ Council Regulation (EC) No 723/2009 of 25 June 2009 on the Community legal framework for a European Research Infrastructure Consortium (ERIC) [2009] OJ L206/1.

² See European Commission, 'Report from the Commission to the Council and the European Parliament – Third Report on the Application of Council Regulation (EC) No 723/2009 of 25 June 2009 on the Community legal framework for a European Research Infrastructure Consortium (ERIC) of August 14 2023' COM(2023) 488 final (the Third ERIC Report), 1.

³ See European Commission, 'Report from the Commission to the European Parliament and the Council – Second Report on the Application of Council Regulation (EC) No 723/2009 of 25 June 2009 on the Community legal framework for a European Research Infrastructure Consortium (ERIC) of July 6 2018' COM(2018) 523 final, 8; and European Commission, 'Report from the Commission to the European Parliament and the Council on the Application of Council Regulation (EC) No 723/2009 of 25 June 2009 on the Community legal framework for a European Research Infrastructure Consortium (ERIC) of July 14 2014' COM(2014) 460 final, 8.

Under certain conditions, an ERIC can have limited economic activities by offering goods and/or services on a given market. Such activities can positively address the increasing demands for ‘innovative’ and ‘socio-economic’ impacts and therefore enhance the ERIC sustainability. However, only a limited number of ERICs have such activities on a regular basis. Uncertainty on the real meaning of ‘limited economic activities’ as well as on compliance with state aid rules and conditions for VAT exemptions are likely at stake. This question [...] also includes other aspects such as how ERICs can develop (and then participate in) spin-offs, technology transfers and receive revenues from services, without weakening their ERIC status. [...] Further and specific guidance on the meaning of ‘limited economic activities’ in the context of state aid rules should be provided for a consistent implementation, to enhance the broader impact of ERICs and therefore their sustainability.⁴

This article examines these Commission statements in the light of how economic activities of ERICs are regulated in the ERIC Regulation and in the statutes of ERICs that have been established at the time of writing. The aim of the article is to clarify how economic activity is regulated in the regulation and ERIC statutes – which includes clarifying the meaning of the concept *economic activity* – and discuss to what extent ERICs *should be* subject to a rule limiting their economic activity considering the purpose of the ERIC legal form, its structural characteristics and the overall objective of EU involvement in advancing research and technology.

The article begins by describing the ERIC legal form and the main interests pursued and protected by the ERIC Regulation (section 2). Subsequently, section 3 discusses the rules governing the economic activities of ERICs, primarily rules in the ERIC Regulation and in the statutes of established ERICs. Section 4 discusses the rule on limited economic activity in light of the objectives behind the ERIC Regulation, the scope of interest it seeks to protect and the structural characteristics of established ERICs. Section 5 offers concluding remarks.

Although the article necessarily mentions the rules in the Treaty on the functioning of the European Union (TFEU) related to competition matters, in particular Article 107 on State aid, detailed discussion of these rules is outside the scope of the article.

2 THE ERIC LEGAL FORM

2.1 ERICS ARE ENTITIES THAT PURSUE EU OBJECTIVES

The ERIC Regulation grants the Commission the competence to establish a legal entity for setting up and operating a research infrastructure⁵ upon application by one EU Member State

⁴ The Third ERIC Report (n 2) 11-12.

⁵ The ERIC Regulation, Article 2(1)(a), defines research infrastructure as: ‘[...] facilities, resources and related services that are used by the scientific community to conduct top-level research in their respective fields and covers major scientific equipment or sets of instruments; knowledge-based resources such as collections, archives or structures for scientific information; enabling Information and Communications Technology-based

and at least two other countries that are either EU Member States or countries associated with the EU (associated countries).⁶ Other countries (third countries) and intergovernmental organisations can also become ERIC members at a later date if approved by decision of the highest ranking ERIC organ – the assembly of members.⁷ At the time of writing, 30 entities have been established as ERICs, with statutory seats in 12 different European countries.⁸

The ERIC Regulation is adopted in pursuit of a specific Treaty objective, namely to strengthen the scientific and technological bases of the EU by achieving a European research area, as laid down in Article 179 TFEU and further outlined in other provisions of Title XIX TFEU (Articles 179-190). For these purposes, Article 179(2) provides that the EU shall:

encourage undertakings, including small and medium-sized undertakings, research centres and universities in their research and technological development activities of high quality; it shall support their efforts to cooperate with one another, aiming, notably, at permitting researchers to cooperate freely across borders and at enabling undertakings to exploit the internal market potential to the full, in particular through the opening-up of national public contracts, the definition of common standards and the removal of legal and fiscal obstacles to that cooperation.

As can be seen, the objective is to facilitate research activity and, in particular, cross-border cooperation of parties of different nature in order to take full advantage of the internal market. There is therefore a clear link between the economic objective of the internal market and facilitating research activity. As a result, rules in national law that restrict, e.g. the freedom to provide services, can generally not be justified solely based on the objective of advancing *national* research interest, as advancing such interests is an EU objective, and the rules on freedom to provide service are one of the tools to achieve this objective.⁹

The legal base of the ERIC Regulation is Article 187 TFEU, in which the EU is given the competence to establish a legal structure that its institutions deem necessary for the ‘efficient execution of Union research, technological and demonstration programmes’.¹⁰ Accordingly, the main objective of the Regulation is to provide a legal form allowing countries to collaborate in establishing and operating a research infrastructure ‘for the efficient execution of Community research, technological development and demonstration programmes’.¹¹ ERICs are thus legal entities that are set up for executing EU programs in the field of research and technological development and contribute to the development of science in the EU and the competitiveness

infrastructures such as Grid, computing, software and communication, or any other entity of a unique nature essential to achieve excellence in research. Such infrastructures may be ‘single-sited’ or ‘distributed’ (an organised network of resources)’.

⁶ See ERIC Regulation, Articles 5, 6 and 9(2).

⁷ See *ibid* Article 9(2).

⁸ According to information retrieved through the European Commission website on ERICs, <https://research-and-innovation.ec.europa.eu/strategy/strategy-research-and-innovation/our-digital-future/european-research-infrastructures/eric/eric-landscape_en> accessed 5 March 2025.

⁹ See, in this regard, Case C-39/04 *Laboratoires Fournier SA v Direction des vérifications nationales et internationales* EU:C:2005:161.

¹⁰ See ERIC Regulation recital 5.

¹¹ See *ibid* recitals 3 and 24-25.

of the EU economy.¹² What kind of research activity each ERIC is to carry out is dependent on how members formulate their intended collaboration in ERIC statutes and the Commission approving the same.¹³ The approval is dependent on the Commission determining that establishing the ERIC is necessary for the development of European research, including that it is necessary for European research programmes.¹⁴

As can be derived from the discussion above, the overall purpose of the ERIC legal form and established ERICs is to advance science and research in the EU in order to increase economic growth and social well-being in the EU and improve the competitiveness of the EU economic vis-à-vis other markets. The EU is thus an ERIC stakeholder, which is reflected in the fact that decision on whether an ERIC is established is based on Commission assessment on whether the ERIC is likely to contribute to the fulfilment of these goals. The regulation provides rules that are expressly aimed at strengthening the position of members that are EU Member States and associated countries.¹⁵ These rules are intended to protect the research and scientific environment in the EU.

2.2 ERICS ARE MEMBER-BASED ORGANISATIONS

2.2[a] *General*

An ERIC is a member-based organisation in the sense that it is based on two or more (prospective) members agreeing to set up and collaborate in an ERIC. If the Commission accepts their application and decides to set up an ERIC, a legal entity is established that has legal capacity¹⁶ and that is based on delegated management structure. The latter entails that the members are not involved in day-to-day operations but have the ultimate control rights over an ERIC – notwithstanding the control powers of the Commission¹⁷ – which they exercise in the assembly of members.

¹² See ERIC Regulation, *inter alia* recitals 1 and 9.

¹³ Commission approval of the proposed statutes of the ERIC-to-be by is a condition for Commission decision, setting up the ERIC. Further, amendments of description of tasks and activities in statutes can only be adopted upon Commission approval, see ERIC Regulation, Articles 5 and 10-11.

¹⁴ See ERIC Regulation, Article 5(1)(c), in conjunction with Article 4.

¹⁵ See, e.g., ERIC Regulation, Article 9(3), which provides that the Member States and associated countries ‘shall hold jointly the majority of the voting rights in the assembly of members’. See also Council Regulation (EU) No 1261/2013 of 2 December 2013 amending Regulation (EC) No 723/2009 concerning the Community legal framework for a European Research Infrastructures Consortium (ERIC) [2013] OJ L326/1, Article 1.

¹⁶ See ERIC Regulation, Article 7(1)-(2).

¹⁷ Aside the fact that the setting up of an ERIC is dependent upon a Commission decision, after the Commission has reviewed and accepted the objective and statutes of the prospective ERIC (see ERIC Regulation, Articles 5-6 and 10-11), ERICs are under a reporting obligation towards the Commission and the Commission has the competence to repeal its decision, on setting up the ERIC, if an ERIC has breached the regulation and such breach is not remedied (see ERIC Regulation, Article 17).

2.2[b] *Members finance an ERIC*

The financing of an ERIC is based on contributions from members – in cash or by contributing other assets (in-kind contributions).¹⁸ ERIC statutes must contain a rule that obliges members to make contributions to the ERIC budget.¹⁹ Most ERIC statutes oblige members to provide contributions for a period of 5 years after the establishment of an ERIC.²⁰ As contributions from members are the core of ERIC financing the Commission has also required, when assessing ERIC statutes, an obligation from members that they will not relinquish their membership for a certain period after ERIC establishment.²¹

Other forms of financing are not precluded, including external credit financing. However, one of the rationales behind the ERIC Regulation was to avoid a situation where the EU itself finances ERICs.²² Yet the financing of some ERICs is – to a different extent – based on grants received from EU funds.²³ Additionally, ERICs can receive income from their own activity (operations), as will be further discussed below.

2.2[c] *Members have a socio-economic interest in an ERIC*

Although ERICs are entities based on member collaboration, the fact that EU objectives are part of their (mandatory) purpose means that they pursue objectives and interests outside the interests of their members. This does not mean that members do not have an interest in an ERIC. To the contrary, members have both social and economic interests in ERICs that partly – but not wholly – overlaps with the interests of the EU. No established ERIC covers the whole of EU in the sense that it has all EU Member States as its members.

ERIC members are primarily sovereign states, representing the interests of their respective citizens and financing ERICs through public funds. As a result, an ERIC member has a clear interest in ensuring that its expenditure of public funds is not more than necessary, which can be described as direct and individual economic interest. Further, the state in question has an

¹⁸ See also European Commission, ‘Commission Staff Working Document Accompanying document to the Proposal for a Council Regulation on the Community legal framework for a European Research Infrastructure (ERI) Impact Assessment’ COM (2008) 467 final, 36.

¹⁹ See ERIC Regulation, Article 10(1)(h).

²⁰ See Arnljotur Astvaldsson, *The European Research Infrastructure Consortium (ERIC) as governed by EU law and Swedish law: A study on a European Union legal form within the Swedish legal system* (Lund University, Media-Tryck 2022) 170-171.

²¹ See European Commission (Directorate-General for Research and Innovation Research Infrastructures), ‘ERIC Practical Guidelines Legal framework for a European Research Infrastructure Consortium’ (Publications Office of the European Union 2015) (the ERIC Guidelines), 12; and European Commission (Directorate-General for Research), ‘Legal framework for a European Research Infrastructure Consortium – ERIC Practical Guidelines’ (Publications Office of the European Union 2010) (the 2010 ERIC Guidelines), 22.

²² ERICs are, for example, not to be viewed as EU bodies, see e.g. ERIC Regulation recital 6.

²³ As also envisioned in the ERIC Regulation recitals 6 and 19. See also European Commission Press Release MEMO/13/1073 on 29 November 2013 (Brussels) on the setting up of European Social Survey ERIC, EATRIS ERIC, BBMRI ERIC, and ECRIN-ERIC

<https://ec.europa.eu/commission/presscorner/detail/en/memo_13_1073> accessed 6 March 2025: ‘Although Member States remain the main contributors to the setting up and operation of these transnational bodies, up to €37.5 million has been provided in support of the preparation of those four facilities under the EU’s Seventh Framework Programme (FP7)’.

interest in ensuring *its* scientific community, consisting of both public and private actors, has sufficient access to the research infrastructure of the ERIC in question, with the resulting socio-economic benefits for the state in question (which can be described as an indirect individual socio-economic interest).²⁴

2.3 KEY STRUCTURAL CHARACTERICS OF ERICS

2.3[a] *Self-standing legal entities*

The ERIC Regulation provides a legal form setting up self-standing entities that have full legal capacity and that shall be solely liable for their own debts. Members enjoy flexibility in terms of how they structure their own liability,²⁵ but statutes of many established ERICs provide a rule stipulating limited member liability.²⁶ This means that the only liability members have towards an ERIC is to provide the financial contributions to the ERIC, in accordance with their respective commitment in ERIC statutes. In accordance with these characteristics, the ERIC Regulation provides a mandatory rule on organisational structure, based on members delegating the day-to-day running of the ERIC to a board of directors and/or a director general (the executive organs of an ERIC).²⁷

The structural characteristics are similar to key characteristics of private law legal forms for organisation, such as the company limited by shares.²⁸ A key factor that distinguishes ERICs from such legal forms is the fact that ERICs are *not* based on a rule which gives members right to share in economic surpluses, i.e. the profit of operations.

2.3[b] *ERICs and the concept of non-profit*

In for-profit (business) entities, such as the company limited by shares, those financing the entity can be said to *own* the entity through their investment, which gives them a right to both receive residual earnings and control the entity.²⁹ On the other hand, a prohibition or limitation on distributing economic surpluses from the entity and to those outside the entity, including its members or others has been viewed as an essential characteristic of non-profit entities

²⁴ For further outlining of members interest in an ERIC, see Astvaldsson, *The European Research Infrastructure Consortium (ERIC) as governed by EU law and Swedish law* (n 20) 197-200.

²⁵ See ERIC Regulation, Article 14.

²⁶ See Astvaldsson, *The European Research Infrastructure Consortium (ERIC) as governed by EU law and Swedish law* (n 20) 191-192. This is in accordance with the Commission's proposal for the ERIC Regulation, see Commission, 'Proposal for a Council Regulation on the Community legal framework for a European Research Infrastructure (ERI) COM(2008) 467 final, 6, 10 and 12.

²⁷ See ERIC Regulation, Article 12.

²⁸ The company limited by shares – and its characteristic of limited member (shareholder) liability – was one of the main models behind the ERIC legal form, see e.g. European Strategy Forum on Research Infrastructures *Report of the Workshop on the Legal forms of research infrastructures of pan-European interests* (23 March 2006, Brussels) (ESFRI Workshop Report), in particular 4-7. See also Commission Staff Working Document, 'Accompanying document to the Proposal for a Council Regulation on the Community legal framework for a European Research Infrastructure (ERI)' SEC(2008) 2278, 12 and 18.

²⁹ See e.g. Reinier Kraakman et al, *The Anatomy of Corporate Law: A Comparative and Functional Approach* (3rd edn, Oxford University Press 2017) 13.

(a non-distribution constraint).³⁰ Importantly, the existence of a non-profit purpose and/or non-distribution constraint does not mean that a non-profit entity is not allowed to operate on a for-profit basis, in the sense of generating income and incurring expenses (for example in the form of compensation to employees and contractors) and making an economic surplus at the end of its financial year.³¹ It primarily means that such surplus cannot be transferred *out of* the entity *to those that control the entity* – the use of the surplus is confined to financing the operations of the entity in accordance with its purpose.³²

The ERIC Regulation does not provide any rule that clearly provides a non-distribution constraint in the aforementioned sense, i.e. a rule that lays down that the assets of an ERIC are to be solely used to further its research activities and that prohibits the distribution of assets to ERIC members. However, *the statutes* of several ERICs provide a non-distribution constraint in the form of rules stipulating that all resources shall only be used to carry out the main research activity of an ERIC³³ and the preamble of the regulation states that an ERIC should ‘devote *most* of its resources to this principal tas[k]’, i.e. for carrying out research activity.³⁴

In statutes of other ERICs, examples can be found of rules that allow for the possibility of partial distribution of ERIC assets to ERIC members, both during the time of membership³⁵ and in relation to withdrawal of membership.³⁶ As with other parts of ERIC statutes, these rules have been subjected to Commission review and approval.³⁷ Further, as part of their control rights, ERIC members have the competence to initiate (voluntary) liquidation of an ERIC and the regulation does not mandate that remaining net assets are to be transferred to an entity

³⁰ See Henry B Hansmann, ‘The Role of Nonprofit Enterprise’ (1980) 89(5) *The Yale Law Journal* 835, 836; Henry B Hansmann, *The Ownership of Enterprise* (Harvard University Press, Belknap Press 1996), 11 and 35; and Kraakman et al (n 29) 13-14. Non-distribution constraint, as a concept and a constitutive element of non-profit entities, has also been found to be a constitutive element for foundations, as a legal form for non-profit entities, in most EU Member States, see Klaus J Hopt et al, *Feasibility Study on a European Foundation Statute Final Report* (European Commission 2009), 33 and 60 <<https://efc.issue4lab.org/resources/15835/15835.pdf>> accessed 10 March 2025.

³¹ See e.g. Hansmann, *The Ownership of Enterprise* (n 30) 17; Katarina Olsson, *Näringsdrivande stiftelser : en rättslig studie över ändamål, förmögenhet och förvaltning* (Nerenius & Santérus 1996) (with regard to the legal position of foundations, which carry out economic activity, under Swedish law), e.g. pages 183-202 and 211-215; and Hopt et al (n 30) in particular 86-89.

³² See Hansmann, *The Ownership of Enterprise* (n 30) 61, and Henry B Hansmann, ‘Reforming Nonprofit Corporation Law’ (1981) 129(3) *University of Pennsylvania Law Review* 497, 501.

³³ See Astvaldsson, *The European Research Infrastructure Consortium (ERIC) as governed by EU law and Swedish law* (n 20) 231-232 and 243-245.

³⁴ See ERIC Regulation recital 8. Emphasis added.

³⁵ See e.g. Statutes of the European Infrastructure of Open Screening Platforms for Chemical Biology — European Research Infrastructure Consortium (EU-OPENSREEN ERIC) [2018] OJ C111/1, Article 25(3): ‘Income generated by intellectual property produced by EU-OPENSREEN ERIC shall be used for the operations of EU-OPENSREEN ERIC up to a threshold laid down in the Rules of Procedure. The use of income above this threshold *shall be subject to a decision of the Assembly of Members*’. Emphasis added.

³⁶ See e.g. STATUTES OF Euro-Argo ERIC [2014] OJ L136/36, Article 9(3): ‘The Council shall determine if the Member is entitled to any sums upon withdrawal. If the Member is so entitled, the Council shall determine the value of the rights and obligations of such Member taking into account the assets and liabilities of Euro-Argo ERIC as they stand on the date on which such Member ceases to be part of Euro-Argo ERIC’.

³⁷ As required by the ERIC Regulation, see in particular Articles 5 and 11.

carrying out the same, or similar, activities.³⁸ Examination of statutes of established ERICs reveals that a majority of ERIC statutes grant members the right to net assets upon the winding-up of an ERIC, which is in line with Commission guidelines on the ERIC legal form.³⁹

3 ERICS AND ECONOMIC ACTIVITY

3.1 ECONOMIC ACTIVITY AS EU LAW CONCEPT

Under the ERIC Regulation, ERICs are only allowed to carry out limited economic activity, as discussed in detail below. When determining whether an ERIC carries out economic activity the Commission has laid down that it will rely on the definition of *economic activity* under EU competition law.⁴⁰ According to established case law of the Court of Justice of the European Union (CJEU) the term ‘undertaking’, in Treaty articles concerning competition in the internal market,⁴¹ refers to an entity that is involved in economic activity, which again means the offering of goods or services on a given market.⁴²

The activities of both non-profit entities and entities that carry out public administration can fall within this definition of economic activity and thus under the application of competition law rules.⁴³ Further, it is not a requirement that the entity *itself* needs to be directly involved in carrying out economic activity.⁴⁴ As ERICs are (primarily) publicly funded entities whose objective is to produce new knowledge and technology – for which there might be no direct market – it is arguably most likely that their activities come into contact with *economic activity*, in the aforementioned sense, through engaging with private actors who operate commercially in a market. This will be discussed further below.

3.2 TREATY RULES ON COMPETITION IN THE INTERNAL MARKET

The TFEU provides certain rules on competition in the internal market of the EU. Articles 101 and 102 TFEU provide rules that prohibit concerted practices and abuse of dominant position, respectively. Article 107(1) provides the following rule intended to prevent state funding private actors to the detriment of competition in the internal market:

³⁸ The lack of non-distribution constraint upon liquidation is, in and of itself, not alien to the notion of a non-profit entity, see e.g. the legal position of foundations in EU Member States in Hopt et al (n 30) 60 and 84.

³⁹ See Astvaldsson, *The European Research Infrastructure Consortium (ERIC) as governed by EU law and Swedish law* (n 20) 234-236 and 244-245; and ERIC Guidelines (n 21) 43.

⁴⁰ See ERIC Guidelines (n 21) 15.

⁴¹ See rules in Title VII TFEU on competition in the internal market of the EU, in particular Articles 101 and 102 TFEU, which provide rules that prohibit concerted practices and abuse of dominant position, respectively, and Article 107(1), which provides rules on State aid.

⁴² See e.g. case C-35/96 *Commission v Italy* EU:C:1998:303 paras 36-38.

⁴³ See e.g. Case C-41/90 *Höfner and Elser v Macrotron* EU:C:1991:161 e.g. paras 20-24; C-49/07 *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio* EU:C:2008:376 paras 27-28; and C-262/18 P *Commission v Dôvera zdravotná poisťovňa* EU:C:2020:450 para 49.

⁴⁴ See e.g. C-222/04 *Cassa di Risparmio di Firenze and Others* EU:C:2006:8 paras 109-114.

Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

Article 107(3) subsequently lists types of aid that *may*, notwithstanding the rule in Article 107(1), be seen as compatible with the internal market. Among such aid is ‘aid to promote the execution of an important project of common European interest [...]’.⁴⁵

The ERIC Regulation does not directly refer to these TFEU rules on competition. However, the fact that ERICs are primarily financed by states and thereby public funds is liable to raise issues related to competition in the internal market of the EU, primarily the issue of whether the relationship between an ERIC and a private actor might result in State aid within the meaning of EU competition law.⁴⁶ In its most recent report on the ERIC Regulation – the Third ERIC Report – the Commission states that further guidance is needed on ‘the meaning of “limited economic activities” in the context of state aid rules’⁴⁷ without offering further discussion from the perspective of EU competition law or reference to its statements in earlier guidelines in relation thereto.

As the EU institution responsible for monitoring State aid schemes and enforcing Article 107, the Commission has issued a communication on State aid in relation to research, development and innovation⁴⁸ and guidelines on the notion of State aid in relation to research infrastructures.⁴⁹ One of the points of departure of the guidelines and the communication is that while public funding of research infrastructure might amount to State aid that is prohibited under certain circumstances, using such funding in tandem with operations of private parties can contribute positively to the advancement of science and technology.⁵⁰

One of the key elements of the Commission’s assessment of an ERIC matter would presumably be to ascertain whether the ERIC in question had favoured certain private parties at the expense of others, for example when granting access to its resources (e.g. facilities and/or personnel) and deciding to enter into commercial relationships.⁵¹ If an ERIC is using its state funded resources to aid the operation of *certain* – selected – undertakings, i.e. private actors offering products or services in a market, and thus not *all* undertakings, then its economic activity

⁴⁵ See TFEU, Article 107(3)(b).

⁴⁶ See e.g. European Commission, ‘Proposal for a Council Regulation on the Community legal framework for a European Research Infrastructure (ERI)’ COM (2008) 467 final, Preamble, para 9, 11. See also Commission Staff Working Document, ‘Accompanying document to the Proposal for a Council Regulation on the Community legal framework for a European Research Infrastructure (ERI)’ COM (2008) 467 final, para 5.4.

⁴⁷ The Third ERIC Report (n 2) 12.

⁴⁸ See European Commission, ‘Communication from the Commission: Framework for State aid for research and development and innovation’ [2014] OJ C198/1, in particular pages 10-12.

⁴⁹ See European Commission, ‘Guidance on the Notion of State Aid’ on the European Commission website dedicated to State aid <https://competition-policy.ec.europa.eu/document/download/3c15ab87-4521-45af-a3ce-dbd55ee025b_en?filename=notion_of_aid_guid_research_en.pdf> accessed 5 March 2025, in particular pages 3-4.

⁵⁰ *ibid* 2-3.

⁵¹ See *ibid*.

is liable to amount to State aid within the meaning of Article 107(1) TFEU, as the selected undertakings are provided with an economic advantage. One of the ways of avoiding this is to grant equal access on market terms to all potential undertakings, as indicated by the Commission in its communication and guidelines (aforementioned).⁵²

Further discussion on the conditions of Article 107(1) and how they would be applied in a situation concerning an ERIC is outside the scope of this Article.

3.3 ARTICLE 3 OF THE ERIC REGULATION

3.3[a] Article 3(2): *Economic activity must be limited*

The ERIC Regulation provides mandatory rules on the purpose of an ERIC. Under Article 3(1) of the regulation, the main activity of an ERIC shall be to establish and operate a research infrastructure. Article 3(2) provides a rule on the extent to which an ERIC is allowed to engage in economic activity:

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

By its wording, Article 3(2) provides an exemption rule on ERIC purpose, i.e. a rule that allows ERICs to carry out economic activity as an exemption to the main activity, which is to engage in research activities on a non-economic basis. It follows that ERICs are allowed – to a certain extent – to carry out economic activity irrespective of whether their statutes provide any rules in this regard. As shown in later parts of this article, some ERIC statutes provide rules that describe a source of income from a particular type of economic activity.

For the exemption in Article 3(2) to apply, the following conditions need to be fulfilled: (i) the activity in question falls under the definition of *economic activity* within the meaning of the regulation; (ii) the activity is *limited*; (iii) the activity is *closely related to the main research activity* of an ERIC; and (iv) the activity *does not risk achieving the objectives of the research activity*. If the activity in question fulfils these conditions, then such activity is in accordance with the ERIC Regulation and thus allowed.

In its guidelines on the ERIC Regulation the Commission provides several parameters to assess whether a matter falls under Article 3(2) of the Regulation and whether its conditions are fulfilled, including whether the activity is *limited* within the meaning of the article. First, regarding the definition of *economic activity* the Commission reiterates that for Article 3(2) to be applicable there needs to be a *market* for the product or service in question, which '[...] depends on the organisation of the activity by the Member State concerned and can therefore differ from one Member State to another'.⁵³ Further, the Commission notes that the fact that an ERIC charges

⁵² See Commission, 'Communication from the Commission: Framework for State aid for research and development and innovation', in particular pages 10-12; and Guidance on the Notion of State Aid (n 49) in particular pages 3-4 and para 17.

⁵³ See ERIC Guidelines (n 21) 15.

fees in its operations – for example when granting access to its facilities or resources (e.g. services) – does not constitute an *economic activity* ‘if the access and related services do not correspond to what the market can provide’.⁵⁴

Secondly, if an activity constitutes an *economic activity*, the Commission offers indications on how it would assess whether the activity is *limited* within the meaning of Article 3(2), including by stating that an any economic activity ‘must remain secondary and not prevail over the execution of its main tas[k]’⁵⁵ and that one way of assessing this is to compare the volume of different activities based on ‘[q]uantifiable elements [...] such the respective costs and income, use of human resources or the share of access to the facility for economic and non-economic purposes’.⁵⁶ In terms of use of resources specifically it should be recalled that the preamble of the ERIC Regulation states that an ERIC ‘should devote most of its resources’ to its principal, non-economic, task.⁵⁷ Seemingly, the main point is to protect the non-economic part of ERIC operations. However, the Commission also acknowledges that the scope of economic activity can expand and overtake the main, non-economic activity, in terms of quantity so that it becomes the primary activity. Instead of the ERIC being required to take action to minimise such activity – and thus comply with the mandatory rule in Article 3(2) – the Commission suggests that such situations may be remedied by ‘creating a spin-off company’.⁵⁸ While this suggestion is in conformity with the socio-economic objectives behind the ERIC legal form, it raises questions as to whether such practices would simply amount to circumvention of the rule in Article 3(2).

3.3[b] *Article 3(2) as a rule protecting the interests of members*

The question arises whether the finding of State aid under Article 107(1) TFEU (or not) impacts the application of Article 3(2) of the ERIC Regulation. If the scope of interests protected by Article 107(1) TFEU and Article 3(2) of the ERIC Regulation are the same, i.e. preventing state resources from distorting competition in the internal market, then it can be argued that it is unnecessary to assess whether Article 3(2) has been breached *if* the Commission has found the existence of a prohibited State aid within the meaning of Article 107(1). To counter this statement two arguments can be put forward. First, Article 3(2) can be viewed as setting further limitations on economic activity *for the protection of competition in the internal market*, in addition to the requirements of Article 107(1). The fact that Article 3(2) has its own conditions, which are different from the conditions of Article 107(1), supports such conclusion. Based on this, the assessment carried out under Article 3(2) is different from the assessment under Article 107(1) even if it is accepted that the articles seek to protect the same interests. Secondly, as Article 3(2) concerns the purpose of ERICs it should also be viewed as a rule protecting *the interest of an ERIC*

⁵⁴ *ibid.*

⁵⁵ *ibid.*

⁵⁶ *ibid.* See also guidelines from 2010 where the Commission stated the following: ‘On the basis of a combination of various quantifiable elements available, the Commission will generally assume that a share of economic activities below 25 % of total annual activities is limited’. See 2010 ERIC Guidelines (n 21) 13.

⁵⁷ See ERIC Regulation recital 8, and also discussion in Astvaldsson, *The European Research Infrastructure Consortium (ERIC) as governed by EU law and Swedish law* (n 20) 164-165.

⁵⁸ *ibid.*

member as a self-standing interest, distinct from the interest of protecting competition in the internal market.

Regarding the second argument it should be recalled that Article 3(2) of the ERIC Regulation provides a mandatory rule on the purpose of ERIC.⁵⁹ As a rule on the purpose of an organisation, it serves not only to protect the interest of the EU as a stakeholder but also – and perhaps primarily – the interests of ERIC members, which finance the ERIC and hold the ultimate right to control its operations (in the assembly of members). An ERIC member provides financing to an ERIC based on the purpose of ERIC collaboration. The outer limits of the purpose are laid down in the ERIC Regulation, with members agreeing on the more precise purpose in statutes.

It follows that, if countries and intergovernmental organisations have agreed to collaborate in the ERIC legal form, it can be assumed that they do so in order to create a legal entity that engages in research activity with the objective of advancing the development of research and technology within their respective territories and the EU (as a whole), with resultant socio-economic benefits (collective and individual). Further, as an ERIC is an entity that is based on free and voluntary agreement by ERIC members on achieving a common (scientific research) purpose, it can be assumed that *members'* participation in an ERIC is based on the premise: that ERIC organs will, when making decisions and undertaking action act: (i) within the scope of the purpose of the ERIC, as laid down by the ERIC Regulation and respective statutes; and (ii) in the collective interest of *all* members, as opposed to the interest of one or more members at the expense of other members.⁶⁰ It follows that the rule on limited economic activities in Article 3(2) is an integrated part of the *mandatory* purpose structure of ERICs, which *shall* establish and operate research infrastructure and only engage in economic activity to a limited extent. The organs of an ERIC are bound by this rule on purpose structure when taking decisions and actions. In that way, the purpose structure functions as a protection for the ERIC and its members, which have agreed to join an ERIC and, crucially, provide it with financing based on certain premises – primarily the fact that the entity they join operates in accordance with its mandatory purpose structure.

In the light of the above there are strong arguments for viewing Article 3(2) as a rule protecting the socio-economic interests of members *in addition to* any EU interest related to protecting competition in the internal market. This means that assessment of the economic activity of ERICs cannot be isolated to whether competition in the internal market is liable to be distorted, e.g. because of an ERIC providing State aid to a private actor. It also needs to cover assessment on whether an ERIC carries out economic activity in excess of what is allowed under Article 3(2) of the regulation, independent of any competition concerns. Yet, the question remains whether it is desirable for an ERIC to be bound by such mandatory rule on the scope

⁵⁹ For a discussion on mandatory rules in the ERIC Regulation see Arnljotur Astvaldsson, 'Construing the ERIC Legal Form From the Perspective of the Swedish legislator' in Ulf Maunsbach and Axel Hilling (eds), *Big Science and the Law* (Ex Tuto Publishing 2021), in particular pages 113-115.

⁶⁰ See Astvaldsson, *The European Research Infrastructure Consortium (ERIC) as governed by EU law and Swedish law* (n 20) 533-534.

of purpose, i.e. whether such rule advances the interests of ERIC members (and the EU). This will be addressed specifically in Section 4 below.

3.3[c] Article 3(3): Economic activity must be priced on market terms

The economic activity of an ERIC is subject to a further rule in Article 3(3) of the regulation, which reads as follows:

An ERIC shall record the costs and revenues of its economic activities separately and shall charge market prices for them, or, if these cannot be ascertained, full costs plus a reasonable margin.

By its wording, Article 3(3) provides at least two different rules: (i) a rule providing that economic activities should be held separate from the non-economic activities with respect to accounting for revenues and costs; and (ii) a rule providing a limit on how much an ERIC can charge for its economic activities. The second rule contains two separate rules based on two different scenarios. If the economic activity is carried out on a *market*, then an ERIC is not allowed to charge more than *market price*. If, on the other hand, the activity is not carried out on a market, with the consequence that no market price can be established, then an ERIC is not allowed to charge more than the full cost (of making a product or providing a service) in addition to a ‘reasonable margin’. The rules provided in Article 3(3) reflect the Commission’s view on the notion of State aid in relation to research infrastructures, as put forward in its guidelines.⁶¹

It follows that Article 3(3) distinguishes between whether the economic activity of an ERIC is carried out on a market or not. However, the Commission guidelines on the ERIC legal form seem to connect both scenarios to the existence of a market, when stating that reasonable margin may be ‘established by reference to margins commonly applied by undertakings for the same activity’.⁶² This serves as a further indication that the Commission views ERIC engagement in economic activity – including the prices charges when carrying out such activity – primarily from the perspective of interests protected by EU competition law. The thinking seems to be that ERICs are prohibited from distorting competition by using their publicly funded operations to lower prices to the detriment of other actors operating on a given market and, thus, to competition on the market with the eventual negative effects on consumers. The rule intended to prevent such distortion of competition is Article 107 TFEU on State aid.

3.3[d] Applying the rules in article 3(2)-(3) to the economic activity of an ERIC

Based on the arguments above, Article 3(2) should be viewed as a rule that is separate from any assessment of whether an ERIC’s collaboration with a private actor amounts to State aid within the meaning of Article 107(1) TFEU. It follows that if the *economic activity* of an ERIC is (i) closely related to its the main research task and (ii) and *limited* when compared to its main research task

⁶¹ See European Commission, ‘Communication from the Commission: Framework for State aid for research and development and innovation’ [2014] OJ C198/1, in particular Section 2.2. on pages 10-11; and Guidance on the Notion of State Aid (n 49), in particular section 2. on pages 2-3.

⁶² See ERIC Guidelines (n 21) 15.

– so that achieving the main task is not put at risk – then the activity is allowed *under the ERIC Regulation*. The activity must be subordinated to the research activity of an ERIC and that quantifiable elements may be used to assess this,⁶³ including numbers on use of resources.

Article 3(3) provides an additional (and final) restriction on ERIC economic activity under the ERIC Regulation. If the economic activity of an ERIC neither amounts to prohibited State aid under Article 107(1) TFEU nor in breach of Article 3(2) of the ERIC Regulation – as it is closely related to its main research task and limited vis-à-vis the main task – the remaining part of the test revolves around whether its economic activity is provided on terms that are compatible with Article 3(3) of the regulation. It follows that even though an economic activity of an ERIC is limited vis-à-vis its research activity it still needs to be carried out in accordance with the conditions of Article 3(3). This means that an ERIC is not at liberty in terms of pricing its products or services. To the contrary it must either price its economic activities at a *market price* or, if such price cannot be ascertained, a price that equals *full costs plus reasonable margin*. The rule in Article 3(3) has clear connection with the interests protected by Article 107(1) TFEU, i.e. one of the aims of the rule is to prevent an ERIC from using its public funds to subsidize the products and services it offers on a market.

3.4 THE ECONOMIC ACTIVITY OF ERICS IN PRACTICE

3.4[a] General

Strictly speaking it follows from the discussion above, that if the concept of economic activity in the ERIC Regulation has the same constitutive elements as the concept of economic activity in EU competition law, then an ERIC activity is not economic unless it consists of the ERIC *itself* offering products or services *on a market*. However, given the purpose of ERICs, which is to carry out research activity with the activity of producing *new* knowledge and technology,⁶⁴ it is arguably unlikely that such strict interpretation of the concept *economic activity* would be applied vis-à-vis ERICs, with the effect that their operations are *excluded* from the scope of EU competition law. Regarding the concept of *economic activity* – and the interests protected by EU competition law – the main issue seems to be determining under what circumstances ERIC activity can overlap with the activity of private actors operating in a (private) market. This section offers some examples of such overlap based on examination of ERIC statutes. More precisely, this section offers examples of how several ERICs regulate income from their own operations, including operations that can be defined as economic activity.⁶⁵

⁶³ See discussion in Section 3.3[a].

⁶⁴ The uniqueness of ERICs and their resources is arguably likely to result in a situation where there is not definable market regarding the service they can offer, including in the form of granting access to unique research infrastructures.

⁶⁵ The intention is by no means to offer an exhaustive account of how ERICs regulate income from their own (economic) activity in statutes. For a more comprehensive account see Astvaldsson, *The European Research Infrastructure Consortium (ERIC) as governed by EU law and Swedish law* (n 20) Chapter 4.4.2.5, in particular pages 176-183, on which the descriptions of ERICs in this section are based.

When describing the precise nature of their activity in ERIC statutes, many ERICs also address the issue of economic activity. This is in line with the Commission guidelines on the ERIC legal form.⁶⁶ However, the text of ERIC statutes on economic activities is commonly limited to restating the language of Articles 3(2) and 3(3) of the regulation,⁶⁷ following the template for ERIC statutes provided by the Commission.⁶⁸ Based on examination of ERIC statutes, financial income because of an ERIC's *own activities* can be categorised into two main categories. First, there is income related to (i) *granting access* to the research infrastructure and its resources⁶⁹ and (ii) *providing services* in relation thereto.⁷⁰ Secondly, several ERICs foresee generating income by developing intellectual property.⁷¹

3.4[b] *Commercial relationships with private actors*⁷²

The nature of the activities of several ERICs is amenable to collaboration with private industry, for example ERICS within the field of biological and medical sciences. EATRIS ERIC is, as an example, operational within the field of transnational medicine, forming a central research hub for research on medicines and vaccines,⁷³ a field with a high potential for industrial application and commercialisation of resources and services. Accordingly, the Statutes of EATRIS ERIC provide several indications of what such activity might consist of, including commercial relations with industrial third parties as to intellectual property rights,⁷⁴ and potential income stemming from user fees.⁷⁵

The statutes of EU-OPENSOURCE ERIC, a research infrastructure that connects chemistry and biological facilities, cite the strengthening of academia-industry collaboration as one of its foundational objectives and list exchanges with industry among activities.⁷⁶ Foreseen

⁶⁶ See ERIC Guidelines (n 21) 11.

⁶⁷ Another common feature of ERIC statutes is to restate the language of recital 8 in the preamble to the ERIC Regulation: 'In order to promote innovation and knowledge and technology transfer, the ERIC should be allowed to carry out some limited economic activities if they are closely related to its principal task and they do not jeopardise its achievement'.

⁶⁸ See ERIC Guidelines (n 21) 25.

⁶⁹ In ERICs where research is not carried out on single (physical) site but through an organised network of resources, i.e. distributed ERICs (see definition of 'research infrastructure' in Article 2(1)(a) of the ERIC Regulation), such access can, for example, be in the form of online access to consolidated research results of the ERIC network. In single-site ERICs such as European Spallation Source ERIC, access is (primarily) in the form of allocated experimental time at a physical research facility.

⁷⁰ For example, services provided by the personnel of the relevant ERIC in relation to third party use (access) of the infrastructure, which may be part of a partnership formed with the private actor that receives the services.

⁷¹ See also the account offered in Ana Nordberg, 'Big Science, Big Data, Big Innovation? ERIC Policies on IP, Data and Technology Transfer' in Ulf Maunsbach and Axel Hilling (eds), *Big Science and the Law* (Ex Tuto Publishing 2021) 95.

⁷² The descriptions of ERICs in this section are primarily based on discussion in Astvaldsson, *The European Research Infrastructure Consortium (ERIC) as governed by EU law and Swedish law* (n 20) in particular pages 177-180.

⁷³ See Statutes of the European Advanced Translational Research Infrastructure in Medicine as a European Research Infrastructure Consortium (EATRIS ERIC) [2013] OJ L 298/38, e.g. Article 2.

⁷⁴ See *ibid*, e.g. Articles 20(3), 22(1), and 27.

⁷⁵ See *ibid*, Appendix 2, para c.

⁷⁶ See Statutes of the European Infrastructure of Open Screening Platforms for Chemical Biology — European Research Infrastructure Consortium (EU-OPENSOURCE ERIC) [2018] OJ C111/1, Preamble, recital e, Article 3(3)(h), and Annex 3, 6 b.

income is in the form of payment for access to EU-OPENSOURCE ERIC services and resources.⁷⁷ ECRIN-ERIC – a research infrastructure supporting and coordinating the carrying out of multinational clinical trials, to advance research on the diagnosis, prevention and treatment of disease – is another ERIC whose statutes place significant emphasis on the relationship with industry. Its statutes distinguish between economic and non-economic activity based on the recipient of services, i.e. the user of the research infrastructure and not the nature of the activity.⁷⁸ The statutes stipulate that ‘ECRIN-ERIC shall provide services at a not-for-profit rate for non-economic activities’.⁷⁹

The statutes of Instruct-ERIC and BBMRI-ERIC can be described as providing a clear mandate in terms of commercialisation of the research activity carried out within their respective distributed research infrastructures, by collaborating with private industry.⁸⁰ The statutes of Instruct-ERIC⁸¹ offer guidance on how the fee for access shall be determined. Access to researchers from ‘institutions’ located within Instruct-ERIC members shall be ‘funded’ by Instruct-ERIC. Access for users from ‘non-members’ for ‘academic or pre-competitive research’ shall be granted in return for ‘an academic fee’ while users from non-members, which request access ‘for proprietary research shall be charged a commercial fee for access’ with the proviso that ‘the data arising from access will belong to the user and there shall be no obligation to disclose or publish it’.⁸² It follows that, in terms of determining rate of access fee, the statutes of Instruct-ERIC distinguish between, firstly, whether the use in question is by a member or a non-member and secondly, whether the use is for academic or commercial purposes. As with the statutes of ECRIN-ERIC (discussed above), it is the nature of the activity of the ERIC *user* that determines the level of payment demanded for access.

The scientific field of marine biology and ocean sciences is another field suited to industrial application of research. Accordingly, the statutes of all three ERICs operating within that field regulate economic activities. EMBRC-ERIC lists income from service provision and commercialisation of intellectual property rights as a part of its resources,⁸³ while Euro-Argo ERIC can derive income from remuneration for services provided to third parties and income from commercialisation of its intellectual property rights.⁸⁴ EMBRC-ERIC is an ERIC with a

⁷⁷ See *ibid* Article 22 and Annex 3, para 9.

⁷⁸ See Statutes of the European Clinical Research Infrastructure Network (ECRIN-ERIC) [2013] OJ L324/8 (Statutes of ECRIN-ERIC), e.g. Article 2(2)(b), which states that ECRIN-ERIC shall ‘be primarily accessible to investigator-initiated clinical research, but also open to industry sponsored clinical research projects, originating from any country’.

⁷⁹ Statutes of ECRIN-ERIC, Article 11(4).

⁸⁰ The Statutes of the Biobanking Biobanks and Biomolecular Resources Research Infrastructures European Research Infrastructure Consortium (BBMRI-ERIC) [2013] OJ L320/63 (Statutes of BBMRI-ERIC) list the performance of ‘research services for public and private institutions’ as one of its core activities, see Statutes of BBMRI-ERIC, Article 3(1) and (3)(3)(f) and Article 5(11).

⁸¹ Instruct-ERIC is a distributed research infrastructure coordinating and granting access to research on structural cell biology, see Statutes of Instruct European Research Infrastructure Consortium (Instruct-ERIC) as of 15 July 2017 ([2017] OJ C230/01) (Statutes of Instruct-ERIC), in particular Article 4.

⁸² See Statutes of Instruct-ERIC, Article 25(3)-(8).

⁸³ See Statutes of the European Marine Biological Resource Centre — European Research Infrastructure Consortium (EMBRC-ERIC) [2018] OJ C69/1 (Statutes of EMBRC-ERIC), Article 11.1(b).

⁸⁴ See Statutes of Euro-Argo ERIC, Article 19(1)(c).

relatively high level of foreseen commercial relationship with private industry, in particular in the form of technology transfer.⁸⁵ EMSO-ERIC lists income from provision of services to third parties, and third party exploitation of its intellectual property rights, as part of its resources and expressly mentions private users as ‘stakeholders’, which it shall serve by developing ‘added-value data products’ as well as by granting access to its research resources in return for payment.⁸⁶

In bringing together top material science research facilities in Central and Eastern Europe, a part of the core mission of CERIC-ERIC is to stimulate ‘industrial and economic development’.⁸⁷ Accordingly, its statutes include a provision specifically dedicated to technology transfer and relationship with industry, stating that CERIC-ERIC ‘shall act as a focal point for European industry’.⁸⁸ This is to be achieved through research and development collaborations,⁸⁹ technology transfer, putting emphasis on involving industry in its operations and by facilitating the creation of ‘spin-off industries’ deriving from its research activities.⁹⁰

3.4[c] Summary of economic activities of established ERICs

From the discussion above, it follows that several ERICs are structured to foster collaboration with private industry, especially in fields like biological, medical and marine sciences. The ERICs in question offer opportunities for industrial applications, commercialisation and technology transfer. For example, user fees, payments for access and revenue from IP exploitation are common methods for generating income.

The statutes of different ERICs distinguish between economic and non-economic activities based on the nature of the users, e.g. whether the user is *academic* or *commercial*. This assists the ERICs in determining appropriate access fees charged for accessing their research infrastructures and using the services they provide. If the user is a private actor that intends to commercialise the results of its use, then a higher fee is charged. This is broadly in line with rules of Article 3(3) of the ERIC Regulation, with the caveat that the fee charged *can never be lower* than market price or a fee that is equivalent to full cost (of granting access and providing services) plus a reasonable margin. This follows from the fact that Article 3(3) is a mandatory rule which ERICs cannot deviate by providing a different rule in statutes. Charging those using the research infrastructure for *academic* purposes a lower fee should also be in conformity with the ERIC Regulation if the academic user in question is not operating on a market and thereby not engaging in *economic activity*. If the academic user does not carry out economic activity in this sense, then the activity in question falls outside the scope of Article 3(3) and its mandatory rule on pricing.

⁸⁵ See Statutes of EMBRC-ERIC, Article 4(2)(e).

⁸⁶ See Statutes of the European Multidisciplinary Seafloor and Water Column Observatory — European Research Infrastructure Consortium (EMSO ERIC) [2016] OJ C363/1 (Statutes of EMSO ERIC), Article 16(1)(c) and 22(2), (6).

⁸⁷ See Statutes of Central European Research Infrastructure Consortium (CERIC-ERIC) [2014] OJ L184/51 (Statutes of CERIC-ERIC), Article 5(1).

⁸⁸ See *ibid* Article 20.

⁸⁹ For example, joint development arrangements. CERIC-ERIC lists income from services related to such arrangements as part of its potential financial resources, see Statutes of CERIC-ERIC, Article 6(1)(d).

⁹⁰ See Statutes of CERIC-ERIC, Article 20.

4 SHOULD ERICS BE SUBJECT TO A SPECIFIC RULE LIMITING THEIR ECONOMIC ACTIVITY?

4.1 FRAMING THE ISSUE

As this article has laid out, under EU law the economic activity of ERICs is restricted by several rules that protect different interests. Competition in the internal market is protected by ERICs being – in principle – subject to Article 107(1) TFEU and other rules on State aid and Article 3(3) of the ERIC Regulation. The aim of both rules is to prevent an ERIC from using state funds to subsidise the operations of one or more private actor or subsidising the pricing of its own products or services when the same is offered on a market and thus in competition with other (private) actors.

In addition to these rules, an ERIC is subject to a specific rule in Article 3(2) that limits its economic activity. Although the scope of application of that rule is determined by way of a competition law concept, i.e. *economic activity*, the rule is not solely aimed at protecting competition in the internal market. As a rule on ERIC *purpose*, the rule is also aimed at protecting ERIC members from ERIC organs taking decisions that lie outside the purpose of an ERIC. The members have an individual socio-economic interest in the operations of the ERIC they have financed.

In its Third ERIC Report the Commission raises the issue of defining ‘limited economic activities’ and states that a ‘[f]urther and specific guidance on the meaning of “limited economic activities” in the context of state aid rules should be provided for a consistent implementation, to enhance the broader impact of ERICs and therefore their sustainability’.⁹¹

This section examines the way in which the Commission frames issues concerning limited economic activity considering the general purpose of the ERIC legal form and the structural characteristics of ERICs. In particular, the section raises and discusses the question of whether it is necessary or desirable that ERICs should be subject to a specific restriction on their economic activities – as laid down in Article 3(2) – in addition to restrictions following from rules protecting competition in the internal market, in particular Article 107(1) TFEU and Article 3(3) of the ERIC Regulation.

4.2 ASSESSING THE RULE ON LIMITING ECONOMIC ACTIVITY IN LIGHT OF THE INTERESTS OF EU AND MEMBERS

The ERIC legal form is intended as a vehicle for combining research efforts and resources with the objective of advancing scientific development in the EU⁹² and strengthening the EU economy.⁹³ The idea of realising socio-economic benefits by generating economic value through

⁹¹ The Third ERIC Report (n 2) 12.

⁹² ERIC Regulation, preamble, for example recitals 5 and 9.

⁹³ See Commission Staff Working Document, ‘Accompanying document to the Proposal for a Council Regulation on the Community legal framework for a European Research Infrastructure (ERI)’ COM (2008) 467 final, para 6.1. See also discussion in Astvaldsson, *The European Research Infrastructure Consortium (ERIC) as governed by EU law and Swedish law* (n 20) 166-169.

connecting with private actors was put forward prior to the introduction of the ERIC⁹⁴ and at later points, e.g. as a justification for the public financing of ERICs.⁹⁵ A related argument for using public funds to finance ERICs is that the results of research can be applied in practice,⁹⁶ e.g. by private actors providing goods and/or services for the benefit of consumers (and thus society in general). As regards producing new knowledge in the form of intellectual property, the observation has been made that it is difficult to align a restriction on economic activity with the way in which intellectual property law is structured, i.e. how it connects economic incentives to innovation.⁹⁷ Further, while ERICs are not precluded from transferring intellectual property rights – including to a self-standing (‘spin off’) entity – it has been pointed out that the activities leading up to the creation of such an entity (and subsequent transfer of rights) might amount to economic activity that exceeds the notion of *limited* within the meaning of Article 3(2) of the regulation.⁹⁸ In this context it should be recalled that Article 3(2) is a *mandatory* rule on ERIC purpose, which means that an ERIC is in breach of the regulation if its activities go beyond *limited economic activities*, irrespective of whether that breach is remedied at a later point by transferring the activities to another entity.⁹⁹ A separate issue in this regard is whether the practice of remedying a breach of the regulation in this manner is consistent with the mandatory nature of Article 3(2) or whether it would be construed as a circumvention of the rules. This matter will not be discussed further here.

⁹⁴ As noted by ESFRI in its *Report of the Workshop on the Legal forms of research infrastructures of pan-European interests* (n 28) 14: ‘Research Infrastructures clearly stimulate industrial impacts. Pan-European Research facilities play an outstanding role in building the interface between science and industry. They also contribute to many other socio-economic impacts. The landscape of Europe shows that, where pan-European Research Infrastructures have their site, often “technology clusters” of associated industry or so-called technology parks can be found. Such strategic centres for transfer of knowledge offer either better possibilities for interdisciplinary research contacts or greater attraction to high-tech firms. As a result, this can be an opportunity to increase the public-private interaction also in the funding of research activities’.

⁹⁵ A point that was raised in both Commission reports on the application of the ERIC Regulation, see European Commission, ‘Report from the Commission to the European Parliament and the Council on the Application of Council Regulation (EC) No 723/2009 of 25 June 2009 on the Community legal framework for a European Research Infrastructure Consortium (ERIC)’ COM(2014) 460 final, 8, and European Commission, ‘Report from the Commission to the European Parliament and the Council Second Report on the Application of Council Regulation (EC) No 723/2009 of 25 June 2009 on the Community legal framework for a European Research Infrastructure Consortium (ERIC)’ COM(2018) 523 final, 8-9, with the latter stating the following: ‘The question of economic-versus non-economic activities remains also to be further clarified as there are increasing demands for “innovative” and “socio-economic” impacts of the activities of the research infrastructures justifying the investments to be made by the members’. See also Helen Yu, Jakob Blak Wested, and Timo Minssen, ‘Innovation and Intellectual Property Policies in European Research Infrastructure Consortia-Part I: The Case of the European Spallation Source ERIC’ (2017) 12(5) *Journal of Intellectual Property Law & Practice* 384, 384-385.

⁹⁶ See e.g. Thomas Kaiserfeld and Tom O’Dell (eds), *Legitimizing ESS: Big Science as a Collaboration across Boundaries* (Nordic Academic Press 2013) 27.

⁹⁷ See Nordberg (n 70) 77, who, however, subsequently notes that ERICs are, in this regard, in a position that is not significantly different from other publicly funded research institutions, such as universities: ‘Despite their non-commercial nature, large research facilities contribute to big science and big data and thus often, directly or indirectly, big science translates into big innovation’.

⁹⁸ See Yu, Wested, and Minssen (n 95) 385

⁹⁹ The argument has been made that the possibility of transferring ERIC activities to another entity, i.e. creating a spin-off, means that the mandatory rule in Article 3(2) on limited economic activity is not an issue as such. See European Strategy Forum on Research Infrastructures Innovation Working Group ESFRI, *Innovation-oriented cooperation of Research Infrastructures* (Dipartimento di Fisica - Università degli Studi di Milano 2018) 113.

While contributions from members form the basis of ERIC financing, it can be argued that a rule that limits the economic activity of ERICs – for purposes other than the protection of competition in the internal market – undermines the ability of ERICs to establish themselves as entities that can sustain themselves based on their own income, thus minimising the need for public funding from its members (or, potentially, the EU).¹⁰⁰ The rule consequently undermines the realisation of the structural characteristics ERICs are to have according to the ERIC Regulation and statutes of established ERIC, i.e. legal capacity – including an ERIC's liability for its own debts – and limited member liability (as generally envisaged by statutes of established ERICs). Further, the rule sits oddly with the objectives underlying the TFEU articles from which the ERIC Regulation – and by extension individual ERICs – derive its legal base. For example, Article 179 envisions the freedoms of the internal market as a facilitator for creating European Research Area in which public and private actors collaborate.

Based on the considerations above, it can be argued that it is counter-productive to the overall aims of operating ERICs, as self-standing legal entities to enhance socio-economic development, to have a mandatory rule on ERIC purpose which curbs the operations of an ERIC that successfully commercialises its research in collaboration with private industry, *provided the activities do not distort market conditions and lead to unfair competition terms of other market actors*. A rule on limited economic activity in Article 3(2) – in addition to State aid rules and Article 3(3) – is from this viewpoint liable to add further complications to the mandate on which ERIC organs operate. This may in turn hinder the ability of organs in taking decisions and actions in an effective manner.

4.3 PROTECTING COMPETITION IN THE INTERNAL MARKET

As previously discussed, both Article 107(1) TFEU and Article 3(3) of the ERIC Regulation provide rules for the protection of competition in the internal market. In other words, in so far as ERICs encounter private marketplaces, they are prohibited from using their publicly funded resources to subsidise the operations of private actors to the detriment of competition, i.e. the interests of other actors in the market and, eventually, consumers.

It follows that if the rule on limited economic activity in Article 3(2) is construed as a rule protecting competition in the internal market it can be argued that the rule is superfluous, as such interests are already protected by Article 107(1) TFEU and Article 3(3) of the ERIC Regulation, notwithstanding whether it might be necessary or desirable to offer additional clarifications of how rules on State aid would be applied in the case of ERICs.

4.4 SUGGESTED AMENDMENTS TO ARTICLE 3(2)

In the light of the discussion above it can be argued that, as presently formulated, the rule on limited economic activity in Article 3(2) creates complications to the purpose structure of ERICs

¹⁰⁰ See also discussion in Astvaldsson, *The European Research Infrastructure Consortium (ERIC) as governed by EU law and Swedish law* (n 20) 168.

which are unnecessary from a competition law perspective and undesirable in terms of pursuing the interests of ERIC members and the EU.

If the aim of Article 3(2) is to prevent an ERIC from becoming an entity that is driven by profit motives and thus no longer driven by contributing to the development of research and technological developments, then the author submits that such an aim is more likely to be achieved by simplifying the rule on purpose structure in Article 3(2) by removing references to *non-economic* and *limited economic activity* and adding a mandatory rule on prohibiting the distribution of ERIC assets to ERIC members, i.e. a rule that stipulates that *all* ERIC resources shall be *solely* used for financing its operation in accordance with its purpose (a mandatory non-distribution constraint rule).

An amended article 3 *could* read as follows:

1. The principal task of an ERIC shall be to establish and operate a research infrastructure. Any economic activity of an ERIC shall be closely related to its principal task and not jeopardise the achievement thereof.
2. All ERIC resources shall be devoted to its principal task and related economic activities. Any economic surplus from ERIC activity shall be used solely to finance its operations and cannot be distributed to members or external actors, save for distribution upon winding-up and insolvency in accordance with Article 16.
3. An ERIC shall record the costs and revenues of its economic activities separately and shall charge market prices for them, or, if these cannot be ascertained, full costs plus a reasonable margin.

Article 107(1) TFEU applies to ERICs, if the activity in question falls within its scope, as a Treaty rule, irrespective of whether the ERIC Regulation refers to the rules on State aid or not. Additionally, the Commission has issued a communication and guidelines on how it will assess whether research infrastructures have provided prohibited State aid, as previously discussed.¹⁰¹ It follows that it is debatable whether there is an apparent need to directly refer to Article 107(1) in the ERIC Regulation or provide a rule restricting economic activity, in addition to the Treaty State aid regime. Whether or not it is desirable for the Commission to issue *a separate* or more complete guidance on how it would approach an ERIC matter in relation to State aid matters is outside the scope of this article. This notwithstanding, it is submitted that it might be advisable to consider adding a specific rule to the regulation, which expressly obliges ERICs to deliver a report on the scope of their *economic activities* to the Commission.¹⁰² In that way the Commission would have a clearer mandate in terms of monitoring this part of ERIC activity, for example with regard to assessing whether the activity is in conformity with Article 107(1) TFEU and/or Article 3(3) of the ERIC Regulation based on its own communications and guidelines on State aid and research infrastructures, as the case may be.

¹⁰¹ See discussion in Sections 3.3.2 and 3.3.3.

¹⁰² Rules on ERIC reporting obligations are in Article 17 of the ERIC Regulation.

5 CONCLUDING REMARKS

This article has discussed the rules governing the extent to which entities operating within a European Union legal form – the European Research Infrastructure Consortium – are allowed to carry out economic activities. The roots of the article lie in the Commission’s third report on the application of the ERIC Regulation and its views on the need to clarify the concept of economic activities. The aim of the article was to offer clarifications of the rules governing the economic activity of ERICs and, subsequently, discuss to whether the rules should be amended, given the core rationale behind the ERIC Regulation and the structure of established ERICs.

It can be argued that the current rule on limiting economic activity in Article 3(2) of the ERIC Regulation creates unnecessary complexity that hinders the ability of ERICs to fully achieve their potential in fostering socio-economic development within the EU. While the protection of competition within the internal market is undoubtedly important, existing EU rules, such as Article 107(1) TFEU and Article 3(3) of the ERIC Regulation, already address these concerns. As such, the restriction on economic activity under Article 3(2) may be redundant and counterproductive to the overarching goals of ERICs – namely, enhancing scientific excellence, technological innovation and economic competitiveness across the EU to improve both socio-economic standards within the EU and the competitiveness of the EU vis-à-vis other markets.

Rather than offering further clarifications on the meaning of *limited economic activities*, including in relation to the concept of State aid, as the Commission suggests, the author suggests amending Article 3 of the ERIC Regulation by removing its references to non-economic activity and limited economic activity. The objective should not be to curb the possibility of an ERIC to engage in economic activity *as such* but rather to make sure that when engaging in economic activity an ERIC does not use its public funds to distort competition.

A more simplified rule on ERIC purpose – along with a rule clearly stipulates the way in which ERIC resources should be used (including a distribution constraint) – would allow ERICs the flexibility to engage in economic activities that contribute to their financial sustainability and technological impact, without distorting competition. This approach would also be in line with structural characteristics of ERICs, which are based on the idea of creating a self-standing legal entity that is not dependent on member financing in perpetuity. The author submits that simplifying the rule on limited economic activity and ensuring that all ERIC resources are directed toward their research and technological objectives, with appropriate safeguards for competition, would strengthen the ability of ERICs to fulfil their dual role as hubs of scientific collaboration and engines of innovation, contributing significantly to the advancement of both knowledge and the economic strength of the EU.

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