

Exchange of Experience Session I on Setting up and Start a Legal Entity:

1. What is your experience with the negotiations, hosting/seat choice, preparation and establishment of your legal entity?

ICOS / Marjut Kaukolehto and Cecilia Garrec (Environmental Sciences)

We first established what we called the ICOS Stakeholders' Interim Council (ISIC) in April 2010, 2 years after the start date of the project. This decisive body/council of ministers, ministerial representatives and funding agencies was established mid-way into the preparatory phase such that the project would have first-hand knowledge of funding processes in each country and in order to try and ensure funding by the end of the project for the construction phase (2013). Although there were plans to create this body from the beginning, we decided to wait until the project was in a more advanced and mature stage such that solid and consistent proposals could be made for the stakeholders to decide upon. Our first ISIC meeting was a bit difficult as we were not quite prepared to give a clear idea on which decisions would eventually be needed (constitutional documents, components' locations, principles etc.) to ensure a functioning organization for an operative infrastructure. Meetings after this one were greatly improved once they were chaired by a chair chosen by the ISIC and when Rules of Procedure were approved for this body.

General timeline:

- Preparatory phase project (EC funded, 2008- 2013; constructions started)
- Transition phase (constructions continue, negotiations)
- ICOS ERIC established (operational 2014)

When a preparatory project enters into the negotiation phase, the stakeholders' work has to be supported and structured. When structured decisions, supported by adequate background material, are made available, stakeholders are in a better position to commit and make constructive advice. Up and coming RIs need to consider the structure of the RI including the role of key stakeholders and countries to engage prior to starting negotiation. We note that inclusive negotiations resulted in more supported and consolidated results but are laborious and may last longer. Working groups discussing and providing consensus on legal and financial issues has proven to be an efficient approach in preparing decisions to be discussed and taken (Figure 1).

Communication with the European Commission during the work on establishing the statutes for an ERIC has proven to be important. The use of the existing ERICs as a model was not very useful since all existing ERICs, at this point, are very different.

Hosting seat choice may involve monetary, political and other sensitive issues. The forthcoming host of a legal entity will need to lead the negotiations and invest in the negotiation phase. Finland was agreed to be the host of the legal entity in the discussions during mid-project. Finnish stakeholders and partners were ready to put great effort on the preparations of the organization. Nonbinding Letter of Intent, signed now by 14 countries, established the common will to create the organization for ICOS RI, most likely ERIC form, Finland leading the negotiations, and future legal seat located in Finland, together with the European nodes in several countries. Successful negotiations benefit the RI community and future members. An evaluation of the management structure by an outside panel can provide guidance for the organization at a stage when all documents and plans have been made.

INSTRUCT / Susan Daenke (Biological and Medical Sciences)

Negotiations

The Preparatory Phase Management Committee commissioned a report (July 2009) on several legal models for Instruct consideration- this involved canvassing opinion from scientific, legal and national funding stakeholders as to the best model. As the ERIC was at a very early stage at that time, this was not considered suitable for implementation of Instruct from the projected Transitional/Operation Phase, starting 2011. The model chosen is an International Consortium Agreement (ICA) which defines the responsibilities of all parties to delivering Instruct, the governance and operational structure. Countries signing the ICA committed to paying an Instruct subscription fee of €50,000 per annum to sustain the coordination activities of Instruct and partially fund scientific delivery of access, training, meetings and some fellowship support. Signatories to the ICA were national funding agencies or their delegates or major academic institutions acting at a national level. One country separately negotiated an MOU defining their membership for Instruct.

In addition to the ICA or MOU, a not-for-profit company (Instruct Academic Services Limited) was created to provide a legal entity which would deliver Instruct coordination. The company operates from offices in the UK, can enter into contracts with third parties and is managed by a Board of Directors according to legal process in the UK. Instruct has a Business Plan, a governance structure, a financial structure including a reporting process (which utilizes the University of Oxford Administration services); Instruct Academic Services staff are seconded from the University (academic salary scales).

Hosting

The UK was chosen to host Instruct during the early PP negotiation phase. This was partly because the University of Oxford pledged financial and spatial support to get Instruct started, and the Coordinator (Professor Stuart) had a proven track record in the management of large EU projects, is a scientist with a prominent global reputation in structural biology and had a small scientific administration team in place that could take on the Instruct work. In addition, the proximity in the UK to the Diamond Light Source and associated scientific establishments (which have excellent existing links with European science) relevant to structural biology made this a good choice for the Instruct Central Hub.

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Negotiations

Several legal models were evaluated by the Preparatory Phase Steering Committee, which at an early stage agreed on a mixed model in which EMBL and ELIXIR Member States would conclude a Consortium Agreement and agreed to use EMBL's legal personality for all those activities that need one, such as employing ELIXIR staff. The proposal became part of the Business Plan, which was used for all further negotiations with future Member States. Soon after finalizing the Business Plan we developed a non-binding Memorandum of Understanding which was signed by interested countries. By signing the MoU they agreed in principal to the proposed legal model and to establish and to become part of an interim governance structure that would ideally mirror the governance structure under the future legal model. The negotiation of the MoU as a light non-binding pre-agreement proved very helpful to establish a governance structure that would allow interested countries to assemble and to define actively their expectations of the new infrastructure. The MoU also allowed many countries to contribute to a small starting budget to bridge the so called "valley of death" between the end of the PPP and the time when ELIXIR will be established through its founding documents.

Throughout the whole negotiation process and very early on we involved (and still do so) mainly three sets of people, i.e. scientists, funders and lawyers, which allowed us to create a stable backbone for ELIXIR.

Hosting/seat choice

Very early on the ELIXIR Steering Committee had suggested the Wellcome Trust Genome Campus in Hinxton, UK, as the future seat of ELIXIR. It seemed natural to everybody involved due to the expected high interaction between ELIXIR and EMBL's outstation, the European Bioinformatics Institute, which is located on the same campus. The EMBL-EBI's intergovernmental nature, the role it plays in European coordination efforts, the international bioinformatics resources it already runs, made it a wishful choice to host the ELIXIR Hub alongside. The decision was further reinforced by UK's financial support of a European Data Centre and a new EMBL-EBI building, in which the ELIXIR Hub will be housed, to be constructed on the same campus.

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Type of infrastructure: CLARIN is a distributed data infrastructure that wants to provide unified access to existing repositories offering language based data and services across Europe, in order to facilitate research in the humanities and social sciences. Focus is on coordination and harmonization rather than on capital investment.

Important principles that had a strong influence on the whole process:

- Building on what exists rather than creating new facilities (no capital investment needed)
- No cross-border funding other than an annual fee to cover costs of governance and coordination
- Annual fees based on % of EU GDP (objective and relatively stable), fixed for 5 years in the statutes, so no surprises
- One country – one vote
- Countries are autonomous in **what** they do (should follow from national research priorities) and **how much** they spend (follows from their financial capabilities), but not in **how** they do it (have to comply with standards and quality requirements, ensure interoperability, open access to data and tools created with public funding)
- Governance structure is light, operational services all delegated to and financed by countries

Important factors (as opposed to many other RIs):

- Direct economic impact low: no large construction projects, no major boost of employment or business opportunities around the infrastructure
- Natural for countries to take responsibility for their own languages and language data collections that reflect their own history or cultural heritage
- Difficult for countries to rely on structural funds

Negotiations: Generally pleasant and unproblematic, as a consequence of principles and factors above.

Seat choice and hosting: Choice of NL was never challenged. NL, DE and DK were main driving forces in Prep Phase (coordinated by NL). NL ministry was very proactive in the ERIC process, and the strongest DE centre belongs to the MPG, but happens to be located in NL.

Establishment of CLARIN ERIC: Very smooth (but slow) process. Main contributing factors:

- Very strong support from NL ministry (had already helped setting up the first ERIC ever, SHARE ERIC)
- Very strong support from EC throughout the process
- We had foreseen a funding gap between the Prep Phase project and there was an agreement between the key players (institutions and individuals) to keep infrastructure activities running (at a modest level) and to help setting up the ERIC
- CLARIN was a bottom-up initiative, but funding agencies (ministries or research councils) were actively involved from the very beginning: project partners had to bring a letter of (often moral) support so that they were aware of CLARIN from the start
- There was no financial target, so that any founding coalition bigger than 5 would be a reasonable basis to start (smaller would still be legally ok, but less credible)

2. What would have been useful to know in advance?

ICOS / Marijt Kaukolehto and Cecilia Garrec (Environmental Sciences)

How much effort and resources the negotiation phase takes, and in particular what type and amount of investment would be needed. This is not probably taken into consideration in the plans of the most projects. In ICOS this phase takes place in a so called transition phase (hopefully not a 'valley of death'), the governance of which needs to reflect the governance of the forthcoming organization (Figure 2).

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- Access programmes for scientific research were relatively new in 2009, and the only real comparators were single large facility sites, each of which had a separate management process for access users. It takes a lot of time to put together an operational model that accommodates many different facility types, users, locations and staff and explain how it will work for all scientists. Comprehension and adoption of the Instruct model was slow in the beginning.
- It was difficult to engage with people who were at the decision level: national funders, EC. Scientists do not find it easy to make these connections.
- The ICA has been a key document on which the foundations of Instruct are based – and are being scrutinized now for overlap with ERIC statutes to consider transition to ERIC.
- Flexibility in allowing pro rata subscription commitments for late ICA signatories was crucial.
- Flexibility in finding ways for non-member countries to participate (Instruct national user networks, Instruct Affiliate Centres) were valuable to involve potential new members and demonstrate value.

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- The effect of the MoU which facilitated the whole negotiation process enormously and which otherwise we would have had established even earlier.
- Early public affairs work is essential to help smooth the process.
- The administrative effort to prepare of the negotiation phase and to carry out negotiations is much higher than was expected in the beginning.
- It takes a lot of time for scientists to sort out what they want to do; sometimes scientists aren't best placed to discuss legal issues in great depth.

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- That ESFRI's coordinating role seemed to stop when the roadmap had been published, and that countries started to create their own national roadmaps in a completely uncoordinated way (at least seen from the outside), each following their own procedures, as if the other countries or multi-sited RIs didn't exist
- That, as a result, there is a lack of synchronicity between the activities in the participating countries
- That even though countries accepted a 5 year commitment when they joined the ERIC they allocated their funding for national CLARIN activities on the basis of their usual funding instruments: competitive calls for project proposals. This will lead to discontinuity with countries flying out and (optimistically) in again every few years, and will make it very hard to arrive at a sustainable situation

3. What are the mistakes to avoid?

ICOS / Marjut Kaukolehto and Cecilia Garrec (Environmental Sciences)

Within distributed research infrastructures there is a clear need to accurately identify the perimeter of the organization as early as possible and then start concrete financial and organizational planning. I.e., The organisational work can only start when it is known what will be inside the legal entity and what costs of the RI need to be covered by the members.

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- Have a properly functional decision committee – not so large that it cannot find a consensus and not so small that it is not representative.
- Engage with stakeholders, but be prepared to make some executive decisions if time is pressing
- Prioritise scientific delivery – funders do not wish to pay for administrator salaries.
- Do not underestimate the importance of visibility for your project at EC meetings, discussions, workshops. Commonly it is the most visible project that is championed by lobbyists.

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- Do your best to include all but do not aim to include everyone - otherwise you will lose too much time.
- Develop the Business Plan as early as possible to be able to approach countries as soon as possible.
- Identify key individuals and countries with whom to work closely and get the process rolling.
- Do not enforce decisions, count for enough time for all stakeholders to simply “get used” to the idea of the new infrastructure.
- Don’t run before you can walk.

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After less than a year it is a bit too early to have discovered any major flaws in the whole setup, apart from some minor issues in the statutes that are not serious enough to propose any changes.

4. What lessons have you learnt since you started to run the legal entity?

ICOS / Marjut Kaukolehto and Cecilia Garrec (Environmental Sciences)

Not running yet.

INSTRUCT / Susan Daenke (Biological and Medical Sciences)

Transparency in operating procedures of the company is vital to maintain the confidence of the funders.

You can apply for some types of EU funding through the legal entity, even in early stages.

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We have not yet started to run the legal entity, the draft ELIXIR Consortium Agreement is still negotiated by the interested countries.

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The autonomy of countries is good as a guiding principle, but should be relaxed a bit in order to be able to demonstrate the added value of CLARIN as a European infrastructure, where the combination of data and tools from different sources really lead to new research avenues. Even if you have a

Spanish digital poetry collection and an Estonian dictionary that are technically compatible and perfectly interoperable it is hard to think of a research question for which you can use this combination in an interesting way.

One option might be to impose more coherence between the national CLARIN implementation programmes, but a better and more interesting way might be to go for coordination of and coherence between research programmes at the European level, which could then be supported by the CLARIN infrastructure. For this the ERIC is not the most natural instrument – but it could take initiatives into that direction.

5. What are your recommendations to those who are preparing to run an ERIC?

ICOS / Marijtu Kaukolehto and Cecilia Garrec (Environmental Sciences)

- Involve and engage legal counsels and lawyers that are familiar with the constitutional issues. It is important that there are people who know about the issues related to taxation, VAT issues (in the hosting country(ies)), IPR, research cooperation and constitutional legislation within the different future member states.
- ERIC host country have to provide sustained legal counsel for the negotiations because the hosting country laws apply.
- Be prepared for the negotiation process (resources, time, organisation).
- Understand the difference between the project management culture and management of an operative, permanent organization. Changing from one to the other does not take place in one night, and may be difficult for the researchers.

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Find out about your national Ministry's position towards

- Hosting ERICs– have other ERICs been hosted?
- Participating in an ERIC – get views from all parties on whether ERIC is preferred, not legally supported, misunderstood, ambivalent.
- If you have an existing agreement document, it may map onto the ERIC statutes – check it out.
- You don't have to pay expensive legal fees to make the ERIC application (especially if the point above applies)
- The EU will not discriminate against other legal models in deciding eligibility for H2020 funding for ESFRI projects.

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It is very important to get a good understanding on how long it takes to implement an ERIC. An ERIC needs no ratification. However, that does not necessarily mean that it is a model that can be established faster than other legal models. Consider that it is a two step process, i.e. a preparation process at national level and an application process at European level. Whereas the application process at European level is supposed to take between 3 to 9 months the length of the preparation process at national level is marked by a lot of unknowns:

Find out about your government's position towards

- Hosting ERICs in general – have other ERICs been established already?
- Possibility of your country or future Member States to join ERICs in general; consider problems of Associated Countries, such as Switzerland and Norway for example.

There is also a lot of misinformation about ERICs within the community. Some wrongly assume for example that only ERICs will be eligible for EU funding in the future. This is not the case.

What is the position of the host country regarding the Regulation's requirement under Art. 5 No. 1 (d): *declaration by the host Member State recognising the ERIC as an international body in the sense of Articles 143(g) and 151(1)(b) of Directive 2006/112/EC and as international organisation in the sense of the second indent of Article 23(1) of Directive 92/12/EEC, as of its setting up*. In particular, what are the requirements to achieve such declaration?

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Every RI is unique, but here are just a few very generic recommendations:

- If you want to go for an ERIC it is good to involve the ministries from the very start
- Prepare yourself for a funding gap between any preparatory activities or projects and the real construction, and make sure that you have the resources to keep the major players involved and to preserve the momentum
- Be patient. Everything happens much slower than you expected, even if you expect it to be slower than you expect.

6. Do the non-ERICs plan to become an ERIC at a later stage? If yes, how do you ensure a smooth transition?

ICOS / Marjut Kaukolehto and Cecilia Garrec (Environmental Sciences)

Not applicable.

INSTRUCT / Susan Daenke (Biological and Medical Sciences)

The ERIC is on the Instruct table for reconsideration by Council. For 2013-2015, the existing model will remain and if approved, an ERIC application will be submitted with the expectation of completion by end March 2015.

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The ERIC remains an option if the ELIXIR countries – for whichever reasons – decide to end the ELIXIR Consortium Agreement and to establish ELIXIR as an ERIC.

7. If yes, how do you ensure a smooth transition?

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The existing Instruct ICA has clear similarities to ERIC statute requirements and will form a good basis for drafting the application.

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Establish statutes that would fulfill the requirements of the ERIC Regulations. The ELIXIR Consortium Agreement was drafted in this light.

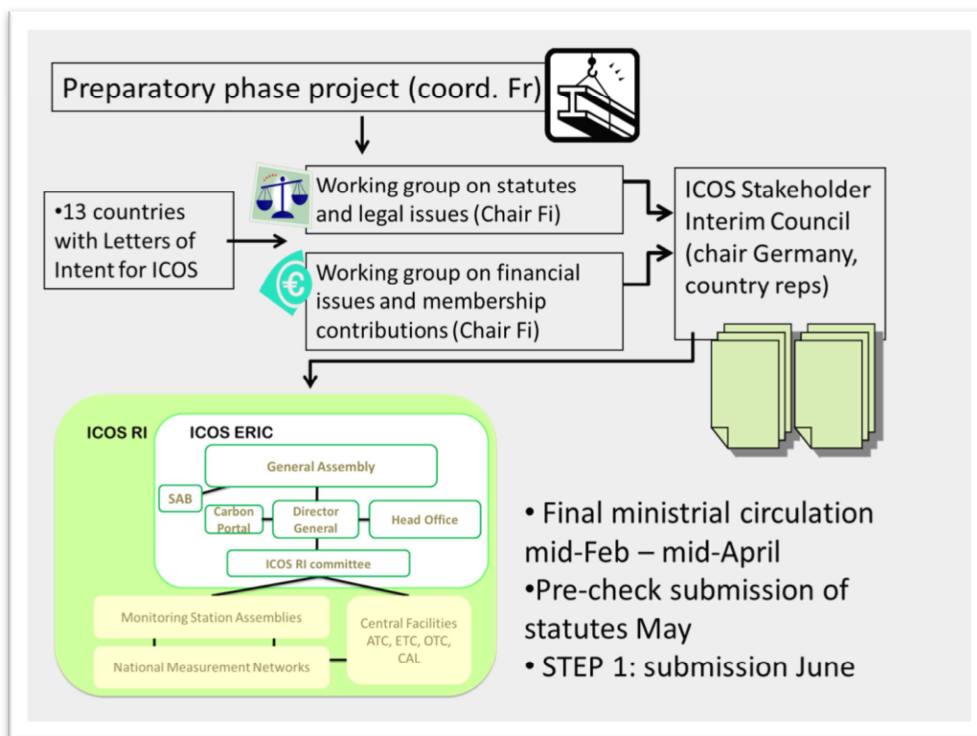


Figure 1. Negotiation process towards ICOS ERIC.

Figure 2. Administrative structure in different phases towards ICOS ERIC

