



**SEVENTH FRAMEWORK PROGRAMME
Research Infrastructures**

**INFRA-2010-2.3.1 – First Implementation Phase of the European High
Performance Computing (HPC) service PRACE**



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- [1] <http://www.prace-ri.eu>
- [2] Community Legal Framework for a European Research Infrastructure Consortium (ERIC), Council Regulation (EC) No 723/2009, 25 June 2009
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List of Acronyms and Abbreviations

AISBL	Belgian international non-profit association AISBL (Association Internationale Sans But Lucratif)
EC	European Commission
ECJ	European Court of Justice
ERIC	European Research Infrastructure Consortium
ESFRI	European Strategy Forum on Research Infrastructures; created roadmap for pan-European Research Infrastructure.
HPC	High Performance Computing; Computing at a high performance level at any given time; often used synonym with Supercomputing
IO	International Organisation
IPR	Intellectual Property Rights
OJ	Official Journal
RI	Research Infrastructure
PRACE	Partnership for Advanced Computing in Europe
Tier-0	Denotes the apex of a conceptual pyramid of HPC systems. In this context the Supercomputing Research Infrastructure would host the Tier-0 systems; national or topical HPC centres would constitute Tier-1
VAT	Value added Tax

Executive Summary

This deliverable compares and analyses the new legal form “European Research Infrastructure Consortium” (ERIC) with the form under which PRACE [1] was established, the AISBL (Association Internationale sans But Lucratif). The option to move towards an ERIC still remains an interesting option for PRACE AISBL.

The basic characteristics of the AISBL and the ERIC are described and compared in light of the PRACE requirements. The Belgian international non-profit association AISBL is often used by European organizations and offers a flexible governance structure and limited liability. The ERIC was specially designed for new European Research Infrastructures and offers some advantages regarding taxation and procurement. The members of ERIC are States which may help to reinforce the sustainability of the Research Infrastructure.

In order to become an ERIC some criteria have to be met by the research infrastructure. In Section 3 of this deliverable the eligibility of PRACE is checked against the requirements of the research infrastructures. The ability to fulfill the requirements by the present members of PRACE is discussed. PRACE fulfills already the defined criteria of the ERIC. However, the members of an ERIC also need to fulfill the requirements for members as set out in the ERIC Regulation. Since PRACE has members from Associated Countries, the governments of these countries will have to recognize the legal personality and capacity of the ERIC and the exemptions granted by the ERIC Regulation, before these associated countries can become member of the ERIC. The PRACE Council needs a comprehensive comparison of the options for the legal form for taking a decision regarding an eventual change of the legal form of PRACE. Several aspects of the ERIC and AISBL are compared in a table. Additionally some specific issues are elaborated in detail. The difference in taxation is restricted to the VAT exemption for an ERIC, compared to an AISBL in Belgium. Since local law will still apply to an ERIC, the comparison was restricted to Belgian law, the present seat of PRACE AISBL being in Brussels (Belgium). Only minor differences were detected regarding funding, intellectual property rights, data protection, industry access and contracts. In order to clarify the difference between an AISBL and ERIC case studies for procurement, operation and personnel are described.

A detailed step by step procedure explains how PRACE AISBL can apply to an ERIC. In addition a to-do list points to open issues and gives hints on how to prepare an application for an ERIC.

1 Introduction

In the PRACE preparatory phase project all necessary documents for incorporating and registering an international non-profit association, including an agreement for the initial period were prepared and finalized. In April 2010, PRACE, the Partnership for Advanced Computing in Europe was founded as international non-profit association under Belgian law (AISBL - *Association Internationale Sans But Lucratif*) with seat in Brussels [8].

The legal framework for the PRACE Research Infrastructure was based on a thorough analysis of the available legal structures. International, European and national legal structures were evaluated. The different options were rated according to PRACE's specific requirements. Legal personality, timely implementation, and limited liability were identified to be prerequisites. The result of this analysis showed that the non-profit association was the most suitable legal structure for PRACE [7]. The new European Community legal structure, the European Research Infrastructure Consortium (ERIC) [2,3], was not fully defined and adopted at this point in time and, hence, not available. Otherwise it would have been taken into consideration as a potentially suitable legal structure to establish the Research Infrastructure (RI) during the preparatory project (1st January 2008 – 30th June 2010). The ERIC has been adopted in the meantime by the ERIC Regulation [2]. As can be seen from this report, a few issues remain to be clarified before the establishment of an ERIC can be contemplated for PRACE.

The ERIC offers specific undeniable advantages compared to national legal forms. First of all, the visibility of PRACE would be significantly improved by adopting an ERIC and by having States as members compared to research organisations in its current structure. It is expected that the direct involvement of States as the members of the Research Infrastructure would secure funding and should in any case ensure the sustainability of the various HPC facilities over their life-time at least for the first five years; this objective applicable to the ERIC's members is confirmed by the European Commission in its Practical Guidelines [3, p. 22]. However, it should be mentioned that the Agreement for the initial period already secures the in kind contributions of the hosting members which guarantees the availability of Tier-0 resources. In addition to these advantages there are also other specific advantages concerning taxation and procurement, which cannot be achieved with pure national legal forms.

PRACE AISBL was set up and is running according to its vision and mission. The purpose of this deliverable is to describe and analyze options for adaptation of its legal form. However, in a previous deliverable [7] of the Preparatory Phase project (grant agreement no RI-211528) it has already been demonstrated, that besides the AISBL non-profit association, the ERIC would be the most suitable of legal structures for PRACE. With this background this deliverable will therefore only focus on the ERIC legal framework and will provide a comparison with the current AISBL entity, it will analyze a few open questions and set out a step-by-step procedure to be followed in case of a change of the legal form from AISBL to ERIC. Amongst the elements analysed for a transition to an ERIC, the deliverable includes the country-dependant legal and tax elements. Nevertheless, the focus of the study has not been the per-country analysis of the best potential headquarters for an ERIC, but an identification of the tax and legal constraints that would make a certain country be a feasible legal seat for an ERIC. The concrete comparison of legal feasibility tax advantages is not possible unless governments are directly requested in a real case of interest. Such an analysis might be performed if PRACE decides to change its legal seat in the future.

2 Options for Legal Forms for PRACE

2.1 AISBL

The Belgian international non-profit association AISBL (Association Internationale Sans But Lucratif) is a well-established legal form specially designed for European organisations in Belgium. Most of its characteristics are well adapted to the special PRACE requirements. The AISBL is a not-for-profit organization with an international dimension and limited liability. The special international form of the not-for-profit association fits perfectly with the European dimension of PRACE. The AISBL is in general a very flexible legal form. PRACE could implement its previously designed governance structure as well as the voting system with its combination of one-member-one-vote and contribution-based elements. Through this, the different status of its members could be accommodated within the AISBL legal framework. The working language could also be defined.

2.2 ERIC

The European Research Infrastructure Consortium (ERIC) is a recently established Community legal form specially designed for European Research Infrastructures. The initiative for this new legal framework came from the discussions on the ESFRI roadmap.

The characteristics of the ERIC are defined in the ERIC Regulation [1] and further explained in the Practical Guidelines [2]. The most salient characteristics are summarised hereafter. The principal task of an ERIC should be the establishment and operation of a research infrastructure within an autonomous legal entity. The ERIC may carry out limited economic activities. In order to benefit from the tax exemptions set out in the ERIC Regulation, the ERIC needs to be recognized by the country hosting its seat as an international body or organisation for the purposes of the Directives on value added tax (VAT) and excise duties. The statutory seat of the ERIC must be in the territory of an EU Member State or an associated country and the ERIC should have a name containing the abbreviation "ERIC". EU Member States, associated countries, third countries other than associated countries and intergovernmental organisations can be members of the ERIC. However, the ERIC must have at least three EU Member States as members and the EU Member States shall hold jointly the majority of the voting rights in the assembly of members of the ERIC. Associated states and third countries need to recognise the legal personality of the ERIC. Any Member State, associated country or third country may be represented by one or more public entities (or entities with a public service mission). The statutes of the ERIC have to be submitted to the EC for approval. The Liability of the members is in principle limited to their respective contributions. The ERIC's setting up and internal functioning shall be governed by the ERIC Regulation, the law of its statutory seat and its statutes but at large it shall be governed mostly by the law of the State where the ERIC has its statutory seat (including any provisions of supra-national law which may be integrated into this State's legal system). The Court of Justice of the European Communities shall have jurisdiction over litigation among the members. Community legislation on jurisdiction shall apply to disputes between ERIC and third parties. ERIC shall produce an annual activity report with the scientific, operational and financial aspects of its activities and send it to the EC. In order to set up an ERIC, the participating States need to submit an application.

3 Moving towards an ERIC

3.1 Check of eligibility

The transition from the present legal form adopted by PRACE to the ERIC form requires a preliminary assessment that the eligibility requirements set out in the ERIC Regulation are actually fully met. This assessment has already been done for other European projects, for example EGI [9]. The ERIC Regulation defines the eligibility criteria both for the infrastructure and the membership.

The eligibility requirements regarding the infrastructure have been listed in Article 4 of the ERIC Regulation [2].

Article 4

Requirements relating to infrastructure

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

- a) it is necessary for the carrying-out of European research programmes and projects including for the efficient execution of Community research, technological development and demonstration programmes;*
- b) it represents an added value in the strengthening and structuring of the European Research Area (ERA) and a significant improvement in the relevant scientific and technological fields at international level;*
- c) effective access, in accordance with the rules established in its Statutes, is granted to the European research community, composed of researchers from Member States and from associated countries;*
- d) it contributes to the mobility of knowledge and/or researchers within the ERA and increases the use of intellectual potential throughout Europe; and*
- e) it contributes to the dissemination and optimisation of the results of activities in Community research, technological development and demonstration.*

The following summary table aims to provide a preliminary assessment of the compliance of PRACE RI with the ERIC requirements for the infrastructure:

	Requirement for RIs from ERIC Regulation	PRACE AISBL	Status of compliance with requirements
a)	The requirement originates in the objective set out in the Treaty (Article 179 TFEU) that addresses the strengthening of European scientific and technological base. Requirement (a) is based on Article 187 TFEU regarding joint undertakings and structures for efficient execution of EU research and technological development.	The mission of PRACE clearly indicates such objectives are the major goals of the association. The Statutes of PRACE, Article 3, state its purpose and activities, which are in line with these objectives.	OK
b)	The ERIC framework clearly aims at providing a powerful means for supporting the integration of national efforts to pool resources in order to build large pan-European persistent infrastructures. Requirement (b) indicates that the ERIC is certainly reserved	PRACE as a pan-European association is compliant with such a requirement. It provides a persistent leading-edge infrastructure that builds on the joint technological and financial efforts of a large number of European countries.	OK

	Requirement for RIs from ERIC Regulation	PRACE AISBL	Status of compliance with requirements
	to state-of-the-art infrastructures that are able to attract high profile researchers on a global level.		
c)	Requirement (c) states that access to the infrastructure has to be open for a large fraction of its capacity to all the European countries and not restricted to its members only. There is no restriction to open the access to non-European countries on a global level. There is a clear indication that access should be made available on the base of scientific excellence and independent peer-review process.	Requirement (c) is fully met. PRACE is open to all European researchers and their collaborators for research projects with high potential for European and international impact. Applications for access are subject to peer review overseen by the PRACE Scientific Steering Committee comprised of leading European researchers.	OK
d)	This requirement originates from Article 180 of the TFEU. Here the effectiveness of the access to the infrastructure plays a major role.	Although there is no direct mention of mobility of knowledge and/or researchers in the Statutes, PRACE complies with the required aspect by providing exchange and use of knowledge in the area of HPC among its members and promotes the collaboration of researchers from various countries.	OK It requires that the Statutes of PRACE ERIC addresses the topic of mobility.
e)	The use and exploitation of project results is considered of utmost importance. The major issues are: <ul style="list-style-type: none"> • Management of knowledge and IPR • Open access to data produced • Planning for use of the results • Dissemination and training / education There is a clear indication that the Statutes should include the support for the basic principles.	PRACE is compliant with the specific requirements although its Statutes do not include any provision for such a topic. Several institutional activities officially defined and approved by the Council address the issues (e.g. training and dissemination, symposium, user forum, industrial collaboration, publication of the results of the projects in major scientific journals).	OK This requires that the Statutes of PRACE ERIC include a specific section on the IPR and the exploitation of results.

Table 1 Assessing ERIC requirements for PRACE RI [3]

The ERIC Regulation provides also requirements for the eligibility of the ERIC members:

Article 9

Requirements for membership

1. *The following entities may become members of an ERIC:*
 - a) *Member States;*
 - b) *associated countries;*
 - c) *third countries other than associated countries;*
 - d) *intergovernmental organisations.*

In its present legal form as an AISBL, PRACE includes 21 members, 18 of them are organizations seated in EU Member States and three are organizations seated in associated countries. No organizations seated in third countries and no Intergovernmental organizations (IO) have presently indicated the intent to apply for membership.

As far as the EU Member States are concerned it has to be pointed out that members of the ERIC are only States or IOs. However, the States can nominate a representative. Associated countries, third countries and IOs must recognize the legal personality, the legal capacity and the submission to applicable laws of the ERIC.

Current PRACE members from Associated Countries are:

- Serbia
- Switzerland
- Turkey

The association instruments between the above countries and the EU needs to be checked in order to verify to what extent such recognition will be necessary, as it may already be implied in said association instrument.

Whatever the outcome of the afore-mentioned check is, PRACE has to take into account the possibility that one of its current members might either have to obtain a formal recognition instrument from its government or may not qualify for ERIC membership and may therefore have to move to observer status. This would lead to an unintended and undesirable change, because the rights of members and observers are not the same and the country in question would suffer a decrease of its present rights.

The statutory seat of an ERIC can be located in an EU Member State or in associated countries, provided some or all of the activities of the ERIC are carried out in that country. The host State will also have to provide an official declaration about the recognition of the ERIC as international organization for the purposes of the VAT Directive and the Excise Duty Directive.

The location of PRACE AISBL's statutory seat is presently Brussels. In order to be able to maintain its seat at this location, Belgium will have to become a member of the ERIC and an official declaration would have to be provided by the Belgian Government pursuant to Article 5(1)(d) of the ERIC Regulation.

3.2 AISBL versus ERIC

In order to consider the transition to a new legal form it is necessary to have a complete understanding of the positive and negative features of the existing and the contemplated legal form and how these two forms compare to each other in relation to the PRACE statutes. Table 2 describes the pros (green) and cons (red) of the AISBL and ERIC legal forms, as well as neutral (blue) aspects of both of them. The comparison takes into account the criteria defined

in PRACE-PP D2.1.1 [7]. Some additional criteria are considered (Sustainability and financial stability, Political visibility, Working languages, Conflict resolution, Choice of location, Naming restrictions), as a result of investigation of the two particular legal forms and taking into account the current situation, as it changed since the time the D2.1.1 was prepared.

Topic	AISBL	ERIC
	PROS	CONS
Recognized Legal Personality	Well recognized International not-for-profit Organization.	New legal structure, which generates some level of legal uncertainty. The legal personality of an ERIC needs to be recognized by associated states and third countries. In order to benefit from the tax exemptions, the ERIC needs to be recognized by the country hosting its seat as an international body or organisation.
Time to implement	Already up and running (simple incorporation).	Long - needs negotiation and approval process on national and EC level. Potentially complex and lengthy negotiations needed to have the agreement of the EU and non-EU member states with an ERIC proposal for PRACE (pre-recognition of the legal form, agreement on the limits and conditions of the tax exemptions and their implementation).
Suitable Governance (autonomy, membership, flexibility of structure)	It is an autonomous legal entity. Allows full membership of entities established in EU and non-EU Member States. The structure is a subject to the Statutes and requirements of Belgian law.	Potential limitations on the governance and organization structure of PRACE and the controls imposed on it by the European Commission (any major change of the statutes needs approval of the EC, annual reporting obligations). Some limitations of rights of non-EU Member States. Countries, instead of their representative organisations, have to be member of the ERIC, which is not currently the case. Potential difficulties in delegating the responsibility from Member States to current PRACE AISBL Members, as they probably would need to be appointed/reappointed as official representatives.
	CONS	PROS

Topic	AISBL	ERIC
European Character	International, but with “national” connotation.	International, specifically designed EU tool. Embraces “distributed” aspect (not different entities in every country).
Sustainability and financial stability	Budget provided by the financial contributions paid by the Members, governments are aware of it but without any obligations.	Improved prospect on achieving sustainability and financial stability - financial contributions are to be paid by the Members (Member States, government bodies or their representatives).
Political visibility	Good, as an international not-for-profit organisation with established communication channels to EC and governments.	Greater political visibility as implementation of the legal form designed by EC. Improved communication with key European policy and decision makers.
Tax privileges/exemptions	Subject to Belgian law (seat of the organization) and local law of each Hosting Member. No privileges.	A body with some privileges/exemptions typical for International Organizations without the need of ratification (VAT and excise duty exemption). Speed of implementation of the privileges may depend on the location of the seat of the ERIC.
Working languages	Pre-determined by local law of the seat of the organization (Belgium), some of the Members need to translate the documentation to the official language of their country.	Defined by Members, some of the Members or their Representatives may still need to translate the documentation to the official language of their country.
Conflict resolution	The statutes are subject to Belgian law, in case of conflict CEPANI Rules of Arbitration apply.	In case of dispute between Members ECJ is the competent court.
	Neutral	Neutral
Non Profit Objective	A not-for-profit purpose and mission of organization. Limited (for profit) economic activity is possible.	A not-for-profit purpose and mission of organization. Limited economic activity is possible.
Flexible for Usage	Subject to the Statutes and requirements of Belgian law.	Basic rules on statutes, but rest is left to creativity/needs (the structure consists of at least an assembly of members and a director or a board of directors. It enables to constitute any other bodies). Any member of an ERIC may be

Topic	AISBL	ERIC
		represented by one or more public entities, including regions or private entities with a public service mission (may involve dividing rights and obligations).
Ownership and Share Transfer	A legal structure open for new members.	A legal structure open for new members.
Limited Liability	Liability limited to contribution.	Liability limited to contribution, but allows increasing liability for fixed amount above contributions if desirable.
Choice of location	Need to be seated in Belgium.	Possible to be located in any EU Member State or in an associated country.
Personnel	Legal form giving the ability to recruit its own personnel.	Legal form giving the ability to recruit its own personnel.
Naming restrictions	Name has to contain "AISBL".	Name has to contain "ERIC".

Table 2 Pros and cons of PRACE AISBL and ERIC legal forms

4 Specific Issues

4.1 Taxation

As has already been mentioned, that from a tax point of view, the main difference between PRACE in its current form, a not-for-profit association incorporated under Belgian law (AISBL), and the ERIC, consists in the VAT exemption on input invoices awarded by the ERIC Regulation. A Table attached hereto as Appendix I explains in further detail for every item of taxation, the difference in the taxation regimes between PRACE as an AISBL and PRACE as an ERIC.

It should be highlighted that the VAT and excise duty exemption depend on a formal declaration by the Host State that it recognizes the ERIC as an international body for purposes of the VAT Directive (Directive 2006/112/EC of 28 November 2006 [4]) and the Excise Duty Directive (92/12/EEC of 25 February 1992 [5]). At the time of drafting of this report, only The Netherlands have made such declaration. Similar declarations by other countries would dispel legal uncertainties as to how these countries will treat organizations with the form of an ERIC.

Furthermore, the analysis attached hereto as Appendix I only looks at how Belgium would treat an ERIC for direct income tax and estate tax purposes. The applicable regime obviously depends of the seat of the ERIC and how that State treats the ERIC for direct income tax and estate tax purposes. This aspect should therefore also be examined when deciding on the seat of the ERIC.

4.2 Funding of PRACE

This issue is dealt with in more detail by another task in work package two. However, as funding and legal structure are interlinked issues, this report briefly highlights how the funding of PRACE is contemplated and what legal constraints, if any, should be taken into account.

A most important source of funding of PRACE consists of the membership fees. Whether PRACE adopts the form of an ERIC or remains an AISBL does not entail any changes in this respect. It is however notable that the Commission highlighted in the Practical Guidelines that the contribution of the members to the ERIC's budget should ensure the sustainability of the facility over its lifetime and as a minimum ensure financing for the first five years of the lifetime of the ERIC [3 – p.22]. Ensuring the continuity of the research infrastructure should indeed be at the core of the member's budgetary considerations.

The second source of funding taken into consideration is constituted by grants from specific EU funding programmes. The ERIC Regulation contains no specific provisions concerning funding by the EU. It only highlights, under recital 19 of the introductory considerations, that an ERIC could qualify for funding in accordance with Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation and other relevant EU legislation.

The change of corporate structure from an AISBL to an ERIC should have no impact as to legal rules applicable to funding from public sources (including EU). It is too early to draw any conclusions as to future funding programmes after the expiry on 31 December 2013 of FP7. As for FP7, to the extent that it is relevant for PRACE in terms of timelines, adopting the form of an ERIC might have a practical positive impact on its eligibility. Indeed, the ERIC structure is specifically meant to facilitate funding of large scale distributed projects by the European Commission and the Member States and therefore mimics their structure. This should be linked with the fact that the ERIC itself is subjected to a greater control by the European Commission from a legal point of view than other legal structures as a result of the reporting and control provisions contained in the ERIC Regulation. Hence, for instance under the rules applicable to FP7, rather than having to build a consortium and requiring an application by several entities to obtain funds (indirect action) for a project, the ERIC in itself would be able to apply as a sole applicant for funding. However, strictly speaking, it cannot be excluded that the current structure (an AISBL grouping members that are all independent legal entities from more than three different EU Member States, none of which are established in the same country) would actually also qualify as a sole participant which would be able to validly submit a proposal for funding under FP7. The comparative advantage of the ERIC over the AISBL is therefore not entirely clear.

4.3 Intellectual property rights (IPRs)

The conversion of the AISBL into an ERIC would not have any major impact from an IPR perspective, except for contracts dealing with IPR issues (e.g. licensing agreement) existing at the time of the conversion where such contracts would contain clauses which allow a party to terminate the contract in case of winding-up of the AISBL. PRACE would have to ensure that the contracting party agrees to continue the contract with the new entity, the ERIC.

4.4 Data protection

The transition from AISBL to an ERIC would not have any major impact from a data protection perspective: the ERIC would have to comply to the same extent as the AISBL with data protection legislation. From a strictly practical point of view, where any declarations or forms have been filled in by relevant authorities, these might have to be renewed or filled in again once the transfer has taken place.

4.5 Industry access

For the purposes of this report, “industry access” and “industrial usage” means the access by commercial companies, selected on the basis of a peer-review process aiming at selecting the best proposal from a scientific perspective, to using cycles provided the results of such research are shared and made freely available to the scientific community through publications (principle of “open research”).

Two issues have to be distinguished in this respect:

- Should PRACE comply with any restrictions to avoid competition issues, i.e. would PRACE give competitive advantage to companies benefitting from using time/cycles? Under which conditions would it be allowed to do so? (section 4.5.1)
- At what point does PRACE, by doing so, engages itself in more than “limited” economic activities and what would be the consequences? (section 4.5.2)

4.5.1 *Industry Access from a competition perspective*

First of all, it is debatable whether PRACE is at all subject to competition law. Indeed, competition law only applies to “undertakings” or “associations of undertakings”. Under EU competition law, an entity (irrespective of legal form) is an “undertaking” if it performs an economic activity. It is questionable whether PRACE itself performs an economic activity (i.e. it offers goods and/or services on a market), or even whether its members do so. Taking the most cautious approach, it is assumed for the purpose of this report that PRACE would be an undertaking or an association of undertakings subject to competition law.

Since PRACE offers access to computing capabilities that are unique in Europe, it could be held to occupy a dominant position within the meaning of Article 102 TFEU. As a consequence, PRACE has a responsibility of not to discriminate and an obligation of not to unduly refuse supplying services.

PRACE may consider in the future allowing commercial players to use the supercomputing cycles. Under competition law, PRACE should ensure that the selection of players which are enabled to use the supercomputing cycles is as objective as possible. In this regard, it must be stressed that PRACE already has a comprehensive system in place to ensure non-discriminatory access, including peer-review, objectively set of evaluation criteria, rules on conflicts of interests, appeal procedure, etc. In addition, the results of the research using PRACE resources must be published in scientific journals or other recognized publications, so that the benefit of the use of the supercomputer resources is shared within the entire scientific community.

These safeguards are necessary and should be applied in a uniform and transparent manner in order to prevent competition issues from arising.

4.5.2 *Respecting the non-profit nature*

AISBL

PRACE does not currently grant access to the industry either as project leaders and or in the form of paid access although its articles of association allow it to do so. The question whether such access should be granted and under which terms (payment of a fee or not) is not yet determined. Currently, the most likely option is that any such access would be granted on a gratuitous basis (and with the safeguards mentioned in the previous section).

Not-for-profit or non-profit associations constitute a category of legal entities which are traditionally opposed to corporations/companies, which are by definition, for profit legal entities. The “not-for-profit” or “non-profit” characteristic refers to the purpose of the legal entity, the reason why it is incorporated. Regarding the purpose, and pursuant to the provisions of the Belgian Associations Act, a not-for-profit association shall not:

- strive to procure a gain or profit to its members;
- conduct industrial or commercial operations.

The prohibition is limited to the aim of the members, which entails that it does not prevent the association itself, from being profitable, as long as:

- the profit is not distributed among the members;
- the profit does not derive from industrial or commercial operations, but derives from (profitable) activities which are accessory to the main (not-for-profit) activity: for such activity to be considered “accessory” it is generally considered that (i) the volume of these should be less important than the non-profit activities (i.e. the total resources allocated to this activity are less important than the resources allocated to the principal activities of the AISBL); (ii) these are necessary to achieve the organization’s non-profit purpose; and (iii) the revenues from these are entirely used to further such purpose (i.e. not for the enrichment of the AISBL or its members).

In case PRACE would not require the payment of a fee or would only require payment of a fee on a cost-basis, it would not make any profits and, hence, there would not be any question as to its compliance with its non-profit nature. If PRACE would charge a fee which would include a margin, it would make profits. However, as long as (1) the fee-based industry access remains of a lesser volume than the non-profit activities of PRACE, (2) the industry access on a fee-basis is necessary for PRACE’s non-profit purpose (e.g. the income would be necessary to fund the possibility to provide access to HPC infrastructure to the scientific community) and (3) the income derived from those fees is entirely used for PRACE’s non-profit purpose, PRACE would comply with the legal principles applicable to its own structure. If not, the AISBL might be at risk of compulsory wind-up.

However, charging a fee (whether on a cost-basis or with a profit margin), may have an impact on the tax regime applicable to it. The distinction between legal entities tax (generally applicable to non-profit organizations) and corporate income tax does not necessarily coincide with the traditional distinction between non-profit legal entities and corporations/companies. Indeed, if a non-profit organization charges a fee on a regular basis, it may be deemed exercising an activity in a commercially organized way, which is sufficient to balance more towards corporate income tax rather than legal entities tax. If the fees are charged on a cost-basis, the effective tax burden under the corporate income tax should normally not be higher

however, given that the cost would be a deductible expense, netting out the fees. Nevertheless, any incidental capital gains (if any) would be taxable, where they are not under the legal entities tax.

ERIC

The ERIC regulation allows the ERIC to pursue “*limited economic activities closely related to its task, provided that they are closely related to its principal task and that they do not jeopardise the achievement thereof*” (article 3.2 of the ERIC Regulation). The question arises whether the granting by PRACE of access to the industry to its infrastructures would be compatible with this requirement.

The Commission has given some guidance in its Practical Guidelines [3 – p.13]. The Commission highlights, on the basis of existing European Court of Justice (ECJ) case-law, that an economic activity consists of offering goods and/or services to a given market that are capable of being carried out (at least in principle but not necessarily) with a view to profit. Furthermore, as stated by the ECJ there is no economic activity, where the State carries out activities that the market could not provide [3 – see p.13 and case-law quoted in footnote 14].

Applying these principles to PRACE, it cannot be excluded that granting access to the industry to the HPC infrastructure be considered as an economic activity of PRACE as an ERIC (whether or not a fee is charged).

The Commission further stresses that the “limited economic activities” mentioned in Article 3(3) of the ERIC Regulation imply that such economic activities must remain “secondary” and must not prevail over the execution of the main task of the ERIC. In this respect the Commission highlights certain quantifiable elements which may be used to determine the acceptable level of economic activities (e.g. respective costs and incomes, use of human resources or the share of access to the facility for economic and non-economic purposes). The Commission states in footnote 17 of the Practical Guidelines that it will generally assume that a share of economic activities below 25 % of total annual activities (based on “various available quantifiable elements”) is limited.

4.6 Contributors Agreement (CA) and User Agreement (UA)

The transition from AISBL to ERIC would not in itself have a significant impact on the Contributors and Users Agreements as such. However, if such a transition were to coincide with a change to the PRACE *modus operandi* (as a result, for instance, of the VAT exemption afforded to the ERIC) so that PRACE becomes the owner of the infrastructure rather than simply coordinating and distributing the use of the national infrastructure (as it is doing at the time of this report) then there would be a need to amend the Contributors Agreement.

The Contributors Agreement is indeed predicated on the basis that the contribution will primarily be a contribution in kind (i.e. computer cycles) by the Hosting Members. If PRACE were to own and operate its own facilities, then it can be presumed that PRACE would be looking for financial contributions from its members and the Contributors Agreement would need to be amended accordingly. Similarly, the Users Agreement is drafted on the basis that the actual infrastructure used by the PRACE users is owned by the third party national entities that allocate computer cycles to PRACE.

4.7 Conversion and asset transfer

The ERIC Regulation understandably does not deal with the conversion of other legal structures into an ERIC as this will be a matter of the national law applicable to the existing legal structure.

In the case of PRACE, it is not entirely correct to talk about a “conversion” as there will be no legal continuity between the AISBL and the ERIC.

Indeed, whereas national laws provide for conversion rules in respect of certain legal structures (e.g. transformation of not-for-profit into profit-seeking entities) or facilitate the transfer of “universalities of assets” or “activities” by certain legal structures (e.g. “*apport à titre gratuit d’universalité*” – article 58 of Belgian Associations Law), none of these possibilities are available in the current body of law to PRACE to deal with the change from an AISBL to an ERIC.

It is currently envisaged that a transition would therefore have to take place in three steps:

- 1) creation of the ERIC,
- 2) winding up (“liquidation”/“vereffening”) of the AISBL in accordance with the Belgian Associations Law,
- 3) transfer of the assets and liabilities from the AISBL to the ERIC: every asset and liability will have to be transferred separately in accordance with rules applicable to its transfer under Belgian law (e.g. consent of the contracting party will be needed to transfer contracts). PRACE does not currently own many assets or have many liabilities so that this practical issue may not be as heavy a practical issue. Towards the future, clauses should be added to any contracts concluded by PRACE AISBL to ensure that the contracting parties already provide their consent to a transfer towards an ERIC.

4.8 Applicable law in PRACE ERIC and national restrictions

The question arises how national restrictions which may apply to the members (e.g. prohibitions to fund certain type of research or cooperate with researchers of certain countries) would apply if PRACE were to adopt the form of an ERIC.

It must be stressed that Article 15 of the ERIC Regulation only deals with the law applicable to the setting up (i.e. the incorporation) and the internal functioning (e.g. functioning of the bodies of the ERIC, the admission of members, etc.) of the ERIC. The ERIC Regulation’s scope is therefore limited to these areas, which will indeed be governed by Community law (in particular the ERIC Regulation), the law of its statutory seat and its statutes. In addition, the VAT and excise duty exemptions and the inapplicability of the Public Procurement Directive will also impact those specific areas of law.

Apart from these areas, the adoption of the ERIC form should not cause any significant changes to the laws governing PRACE, its activities and operations. PRACE will indeed continue to be governed primarily by the law of the State where its statutory seat is based (which includes the international conventions to which this State is a party and which form fully part of its body of law and may, for instance, determine that a different law is applicable to a particular issue, e.g. rules of the Rome Convention on employment contracts). National restrictions resulting from the laws of the country where the ERIC’s seat is based will continue to be applicable (the ERIC does not have any immunity) and the members of the ERIC will remain fully subject to and individually responsible for respecting the national restrictions applicable to them. Section 6 below will look in more detail into the rules applicable to procurement.

5 Towards the ERIC: the step by step procedure

The procedure leading to the establishment of an ERIC is complex and time consuming (three - nine months minimum). In order to complete the submission in a successful manner, it is important to identify each stakeholder involved in the process and highlight each of the steps that need to be addressed.

5.1 Prerequisites

5.1.1 At PRACE AISBL level

The prerequisite is of course the decision by the Council to adopt the ERIC as the new legal form. According the PRACE AISBL statutes, this decision requires a qualified majority of contributions:

Article 14, paragraph 6: “Without prejudice to any applicable laws, the resolution on the winding up of the Association and any matters relating to its net assets require a qualified majority of contributions correspondent to the percentage resulting from the division of the number of Hosting Members by the number of Hosting Members plus one”.

The winding up of the Association may only be voted for at a Council’s meeting specifically called for that purpose.

5.1.2 At national level

Once the decision has been taken by the PRACE Council, it is important that each member investigates the national procedures that enable their participation to the ERIC. The ERIC members being not national HPC entities anymore but States, it is important to anticipate the preparation of the necessary documents well in advance. The European Commission may assist all participants at all stages of the application thanks to a procedure called “pre-submission advice” (http://ec.europa.eu/research/infrastructures/eric_en.html). It will of course take some time for all State members to have all necessary documentation ready for the creation of the ERIC.

5.2 The submission procedure

The submission procedure of the application is a three steps procedure:

5.2.1 Step 0: Preparation of the application

The application has to be prepared by each member and PRACE AISBL. This step is composed of:

- The statutes of the ERIC
- The technical and scientific description of the Research Infrastructure
- The declaration by the host member state recognizing the ERIC as an international body
- The agreement between the members of the ERIC on the limits and conditions of the tax exemptions
- The recognition of the legal personality and the privileges of the ERIC

The procedure of submission of the application is described in the following sections.

5.2.2 Step 1: Electronic submission (verification of compliance with the ERIC regulation)

The electronic submission must be sent by the host state's permanent representation or mission to the EC on behalf of the future ERIC members. Once all the documents have been delivered, the EC together with independent experts will assess the proposal. If accepted, the applicants will have to submit a formal proposal.

5.2.3 Step 2: Signed request to the Commission (set-up of the ERIC)

Once the assessment by the EC is received, the members must send a signed request to set up the ERIC together with the final application to the EC. The EC will, before making its decision, take into account the opinion of a management committee composed of representatives of the EU member states. The formal entry into force of the ERIC is determined by the publication in the OJ, and the date defined by its members.

Flowchart for the treatment of an application

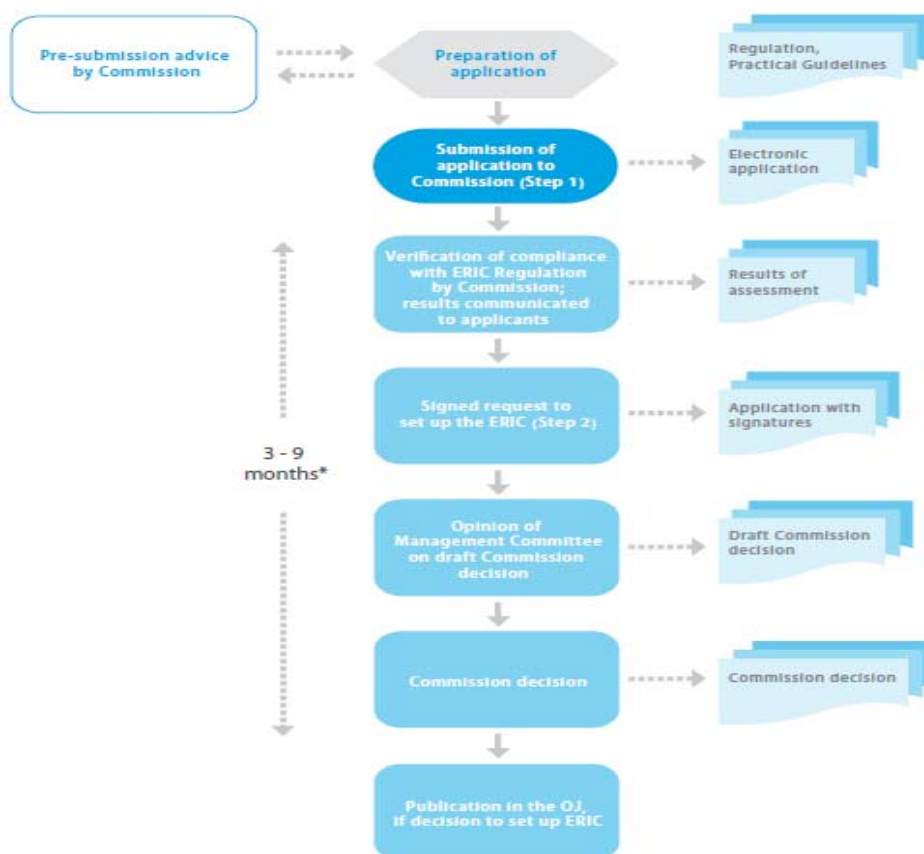


Figure 1 Flowchart for the treatment of an application [3]

5.3 PRACE-specific considerations

One ERIC was already incorporated (SHARE [10]) in March 2011. The treatment of the application took about six months. It is however expected that the transition of PRACE to an ERIC would require more time due to the large number of members, scale of investment and

scope of PRACE. Hence the upper limit of the above time estimate for the creation of an ERIC should be borne in mind.

The minimum number of members of an ERIC is three. Additional members can join an ERIC “on fair and reasonable terms to be specified in the Statutes”. This is an interesting feature to be considered. There is risk that the process of collecting all necessary documents for the 21 PRACE members could take an unforeseeable long time. The members could therefore envisage setting a deadline and implementing the ERIC with the members that provide the required documents within this deadline. If this subset of members is large enough to reflect the European component of the Research Infrastructure (as required and checked by the EC assessment) the ERIC could be created and the remaining partners could join later. However, the political implications of members temporarily changing their status from AISBL members to ERIC observers have to be carefully considered.

6 Case Study: AISBL- ERIC

In order to infer the differences, advantages and possible challenges of the legal structure of the PRACE RI the influence of the legal structure on the following key points is investigated:

- Procurement
- Services / Operation
- Personnel

6.1 Procurement

6.1.1 PRACE AISBL

PRACE has since its start adopted the “Cycles Model” [1]. In the Cycles Model, the Hosting Members of PRACE AISBL are responsible for the procurement of the computer systems to be installed in their countries and make cycles available to PRACE AISBL, which distributes them to European users from academia and industry according to the rules of the PRACE AISBL peer review process.

In the Cycles Model PRACE has a mainly advisory role and is responsible for:

- managing the relationship with the host service provider,
- applying the peer review process for PRACE usage according to the rules defined by PRACE,
- distributed system management.
- meeting user requirements as to which type of architectures are needed for the PRACE infrastructure.

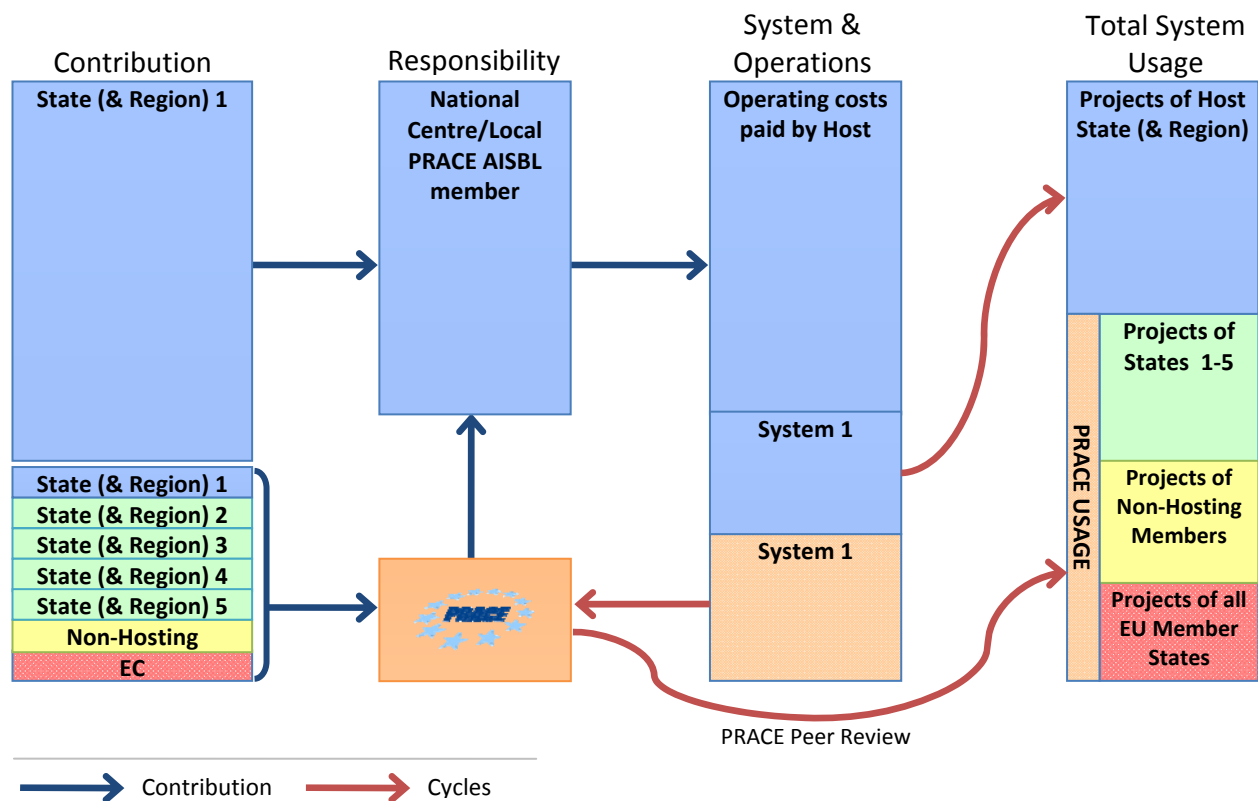


Figure 2 Schematic diagram of the PRACE Cycles Model

Under the Cycles Model, the procurement of new supercomputer systems is made according to the laws of the State of the contracting authority (the Hosting Member). VAT rules (in principle those applicable to the supplier) will also apply to the purchase in question.

In contrast, the “Operator Model” contemplates PRACE centralizing and operating the infrastructure itself. In the Operator Model, PRACE would procure the supercomputer infrastructure and have ownership of it. The AISBL should in principle not have to comply with any public procurement rules.

6.1.2 PRACE ERIC

The ERIC Regulation provides that “*the ERIC is an international organization within the meaning of point c) of Article 15 of Directive 2004/18/EC*” [6]. In other words, the ERIC does not have to follow the rules of the Public Procurement Directive, to the extent that it has its own set of public procurement rules, which have to comply with certain standards. Any procurement through PRACE as an ERIC will have to comply with these rules.

As has been mentioned several times above, one of the main advantages of the adoption of an ERIC results in its exemption from VAT, which may result in a cost reduction of 15 to 25%, depending on which State’s VAT rate is applicable, on the purchase cost. It may therefore be advantageous to move from the Cycles Model to the Operator Model if an ERIC is adopted that can benefit from this cost reduction.

However, as mentioned in section 4.1 above, the VAT exemption requires the recognition by the State in which the ERIC will have its seat of the ERIC as an international organization for the purposes of VAT. The only precedent in this regard at the time of drafting of this report is

the recognition by the Netherlands of SHARE [10, 11] as an international organization for the purposes of VAT.

PRACE could also still use its “Cycles Model” if that is deemed more desirable taking into consideration its financial means. Indeed, apart from the VAT exemption which constitutes indeed an incentive in that respect, the transition from an AISBL to an ERIC would not have in itself any impact on the choice of the model as such.

6.2 Services/Operations

The operation of PRACE is in general independent of the legal structure adopted by it. This means that the change from an AISBL to an ERIC can be seen as neutral. However, as mentioned before, the fact that the VAT exemption granted to the ERIC could impact on the cost of many of the goods and services used by PRACE (e.g. power consumption, maintenance contracts, insurances, software licenses, etc), would be an incentive to a change towards the ERIC. These possibilities may need to be investigated in more detail to have a more definitive idea of the possible cost reductions. This will not be an easy task because some of these reductions may depend on the laws applicable by the host country. The other components of operation are mainly related to personnel and are discussed in the next subsection.

The services to the PRACE users, i.e. allocation of computing cycles, are also independent of the legal structure adopted by it and as such can be seen as neutral.

6.3 Personnel

Neither clear advantages nor disadvantages can be foreseen as a result of the change of the legal structure regarding the personnel employed by PRACE AISBL. Regarding the personnel employed by PRACE, the change from AISBL to ERIC may be seen as neutral.

Towards the future, it is advisable to include clauses acknowledging the transfer of the employment contracts in case of transition to an ERIC.

7 To-Do List

This is a summary of important topics to be considered in the process of establishing a PRACE ERIC.

1. Check status of ERIC in Serbia, Switzerland and Turkey and association instruments concluded between those countries and the EU.
2. Check if Belgium intends to become a member of PRACE in order to keep the present seat or to nominate another ERIC seat for PRACE.
3. Foresee already now the possible change to ERIC (or another legal form) in all relevant contracts for PRACE AISBL.
4. Check if the required declaration by the host Member State recognising ERIC as an international body/organisation in the sense of the VAT and excise duty directives can be obtained in Belgium or in another country.
5. Decision by the PRACE AISBL Council to create an ERIC (and the number of founding members)

6. Compile all necessary documents for the application
7. Submit application
8. Submit signed application
9. Transfer PRACE AISBL assets to PRACE ERIC
10. Decision by the PRACE AISBL Council to wind up the AISBL.

8 Conclusion

The new ERIC form remains an interesting option for the legal form for PRACE. Especially if it would be decided to change the current modus operandi and PRACE would become the owner of Tier-0 systems. However there are some major obstacles, which have to be overcome before the PRACE AISBL Council can decide on moving towards ERIC, such as the recognition of ERIC in all States of the PRACE members. Unfortunately most of these obstacles are highly political and the decisions taken by the member states may depend on considerations beyond the scope of PRACE.

The PRACE Council might decide on the practical solution to create an ERIC after an agreed deadline, possibly with a reduced number of members if not all members are able to provide the required documentation in time. However, this could raise some issues. In the worst case countries that at present are members of PRACE AISBL could decide to join PRACE ERIC later or not at all. This would jeopardize previous achievements concerning the European character of PRACE and possibly have consequences regarding funding.

9 Annex

9.1 Annex: Tax Comparison of AISBL and ERIC

NON-PROFIT ASSOCIATION (AISBL)	ERIC
DIRECT INCOME TAX	
<p>Non-profit organizations are generally subject to the legal entities tax (i.e., mainly taxation of investment income and real estate income). However, if non-profit organizations are organized to realize profits and/or operate as a commercial company, they may become subject to corporate income tax (i.e., taxation of all types of income generated by the organization).</p> <p>Currently, PRACE does not charge for its services rendered and should therefore only be subject to the 'legal entities tax'. This also means that contributions made to PRACE do not constitute taxable income.</p> <p>Since it is not excluded that PRACE will charge (be it small) contributions for the use of supercomputer cycles, PRACE may become subject to corporate income tax.</p>	<p>An ERIC is recognized as an international organization, but explicitly excluded from those international organizations to which the Protocol of 8 April 1965 on the privileges and immunities of the European Communities applies. Therefore, they do <u>not</u> benefit from an absolute tax exemption on any income they may earn, but are to be taxed <u>in accordance with the domestic provisions of their residence state</u>.</p> <p>Generally, as is the case in Belgium, they will qualify as 'regular' non-profit organizations. For Belgium-based ERICs, they are thus normally subject the legal entities tax. However, under the same conditions as set out for non-profit organizations, they may become subject to corporate income tax.</p> <p>In this context, it should be noted that ERICs, if they engage in (limited) economic activities, must charge market prices, or at least cost plus market margin. This may be a trigger event subjecting them to corporate income tax.</p> <p>Currently, PRACE would only be subject to the legal entities tax, should it take the form of an ERIC. However, the same comment applies regarding corporate income tax, if PRACE would, at some point in time, start charging contributions for the use of supercomputer cycles.</p>

NON-PROFIT ASSOCIATION (AISBL)	ERIC
VAT	
<p><u>1. VAT status</u></p> <p>The VAT tax status of a non-profit organization (non-taxable, regular, mixed or exempt) depends on the organization's funding and activities carried out.</p> <p>If the non-profit organization does neither render any services in return for the financial contributions of its members nor any services to third parties, it is in principle a <i>non-taxable person</i>.</p> <p>If the non-profit organization is rendering services for reward, either to its members or to third parties, and such services are not deemed exempt, it will qualify as a <i>regular VAT taxpayer</i>.</p> <p>If some or all of the services are exempt, the non-profit organization will qualify as a <i>mixed or exempt VAT taxpayer</i> respectively.</p> <p>Based on a preliminary assessment, PRACE currently qualifies as a non-taxable person. However, if it would ever start charging fees for the use of supercomputer cycles, it would become a regular VAT taxpayer.</p>	<p><u>1. VAT status</u></p> <p>The ERIC is to be recognized as an international body (other than those benefiting from the EC privileges and immunities). Such recognition does not imply a certain VAT status, but only impacts the <u>recovery</u> of input VAT (i.e. VAT paid on invoices received) (see next section). In other words, an ERIC must still verify its VAT status (see AISBL) based on its funding and activities carried out. Given the nature of its activities, an ERIC is likely to qualify as a non-taxable person, as it must pursue its principal task of operating a research infrastructure on a non-economic basis. However, it may carry out limited economic activities closely related to its task (e.g. charging a fee for the use of the infrastructure) in which case it may become a VAT taxpayer.</p> <p>Given that the same rules apply as is the case for a non-profit association, PRACE – as an ERIC – would currently qualify as a non-taxable person. However, if it would ever start charging fees for the use of supercomputer cycles, it would become a regular VAT taxpayer.</p>
<p><u>2. Input VAT</u></p> <p>Depending on the VAT tax status, the non-profit organization may have full, limited or no right to deduct/recover input VAT (i.e., VAT paid on invoices received).</p> <p>Input VAT will be a full cost (i.e., no exemption or refund) if the non-profit organization qualifies as a non-taxable person or an exempt VAT taxpayer.</p> <p>Based on a preliminary assessment, PRACE currently qualifies as a non-taxable person. This means that PRACE cannot recover any input VAT. However, if it would ever start charging fees for the use of supercomputer</p>	<p><u>2. Input VAT</u></p> <p>The ERIC Regulation introduced an exemption (or refund) of VAT normally payable on invoices received, provided the ERIC qualifies as an international body for purposes of the VAT Directive (Directive 2006/112/EC of 28 November 2006). Therefore, irrespective of the VAT status (see section 1 above), an ERIC should not have any VAT cost on purchased goods or services.</p> <p>Currently, PRACE should not incur any VAT cost, should it take the form of an ERIC, and assuming the ERIC is resident of an EU</p>

NON-PROFIT ASSOCIATION (AISBL)	ERIC
cycles, it would become a VAT taxpayer, in which case it should be able to recover (some or all) input VAT on purchased goods or services.	country that has recognized the ERIC as an international body.
<p><u>3. Charging VAT</u></p> <p>If a non-profit organization qualifies as a non-taxable person, no VAT must be charged.</p> <p>Once the non-profit organization qualifies as a VAT taxpayer (regular, mixed or exempt), it may have to invoice VAT to its members/third party customers. The applicable rules for charging VAT will depend on the VAT status and residence of the members/third party customers concerned.</p> <p>Based on a preliminary assessment, PRACE currently qualifies as a non-taxable person because it does not render services for reward (to members or third parties). Hence, no VAT has to be charged. This will in principle be different if PRACE would start charging fees for the use of supercomputer cycles.</p>	<p><u>3. Charging VAT</u></p> <p>If an ERIC qualifies as a non-taxable person (which will mostly be the case – see section 1 above), no VAT must be charged.</p> <p>However, if it should nevertheless qualify as a VAT taxpayer (regular, mixed or exempt), e.g. if it consistently charges a fee for the use of the research infrastructure it operates, it may have to invoice VAT to its users. The applicable rules for charging VAT will depend on the VAT status and residence of the said users.</p> <p>Currently, should PRACE take the form of an ERIC, the situation would not be different than the one for a non-profit organization.</p>
EXCISE DUTIES	
<p>The purchase of excise products (e.g., mineral oil, tobacco, alcohol, coffee...) will be subject to the relevant excise duties, if purchased by a non-profit organization.</p> <p>This should not be relevant for PRACE.</p>	<p>The EC Regulation has proposed that an ERIC would also be recognized as an international body for purposes of the Excise Duty Directive (92/12/EEC of 25 February 1992), in which case the excise products purchased by an ERIC would not be subject to any excise duties.</p> <p>Despite the advantage compared to the AISBL, this should not be relevant for PRACE.</p>
ESTATE TAX	
<p>Belgian non-profit associations are liable to an annual estate tax (0.17 % over the value of all the assets owned in Belgium – with certain exclusions such as cash and foreign</p>	<p>An ERIC is to be recognized as an international body (other than those benefiting from the EC privileges and immunities), which is not automatically</p>

NON-PROFIT ASSOCIATION (<i>AISBL</i>)	ERIC
<p>real estate -, provided the value of the owned assets exceeds 25.000 EUR).</p> <p>Certain institutions and public bodies are exempted, mainly because they were incorporated before 1921, or because of the philanthropic or educational nature of their activities.</p> <p>PRACE is currently liable to the estate tax (provided the threshold is exceeded).</p>	<p>exempt from any estate tax that may exist in the country of residence.</p> <p>A Belgian resident ERIC, however, will not be subject to the estate tax, as this is limited to national and international non-profit organizations (<i>asbl</i> and <i>aisbl</i>) and foundations.</p> <p>Therefore, should PRACE take the form of an ERIC, it should no longer be subject to the estate tax regulations.</p>