



**SEVENTH FRAMEWORK PROGRAMME  
Research Infrastructures**

**INFRA-2007-2.2.2.1 - Preparatory phase for 'Computer and Data Treatment' research infrastructures in the 2006 ESFRI Roadmap**



**PRACE**

**Partnership for Advanced Computing in Europe**

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**D2.1.1**

**Report on options for a legal entity**

***Final***

Version: 1.2  
Author(s): F. Berberich, GCS / JSC, Eugene Griffiths, BSC  
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*Note this document is made available to the ESFRI List Preparatory Phase Projects for their internal use. Some PRACE specific criteria and project internal recommendations have been removed.*



## Project and Deliverable Information Sheet

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<b>Authorship</b>	<b>Written by:</b>	Florian Berberich, Eugene Griffiths
	<b>Contributors:</b>	Alain Lichnewsy, Edouard Brunel, Virginie Mahdi, Katharina Schwemmer, Andrew Wright, Jane Nicholson, Francesc Subirada
	<b>Reviewed by:</b>	Dietmar Erwin, Mark Parsons
	<b>Approved by:</b>	Technical Board

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<b>Keywords:</b>	PRACE, HPC, Research Infrastructure
<b>Abstract:</b>	<p>The objective of the project Partnership for Advanced Computing in Europe (PRACE) within the INFRA-2007-2.2.2.1 - Preparatory phase for 'Computer and Data Treatment' research infrastructures in the 2006 ESFRI Roadmap is the establishment of a persistent pan-European high performance computing (HPC) service and infrastructure. This infrastructure is to be managed as a single European legal entity.</p> <p>International, European and national legal forms were investigated to identify the most suitable one for PRACE. In particular, the legal form ERI "European Research Infrastructure" which is proposed by the European Commission has been investigated. This evaluation is to support the PRACE Management Board in selecting the appropriate legal form.</p>

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### List of Acronyms and Abbreviations

DoW	Description of Work
EEIG	European Economic Interest Grouping
EGTC	European grouping of territorial cooperation
ESFRI	European Strategy Forum on Research Infrastructures; created roadmap for pan-European Research Infrastructure.
ERI	European Research Infrastructure
GP	General Partners
HET	High Performance Computing in Europe Taskforce. Taskforce by representatives from European HPC community to shape the European HPC Research Infrastructure. Produced the scientific case and valuable groundwork for the PACE project.
HPC	High Performance Computing; Computing at a high performance level at any given time; often used synonym with Supercomputing.
HPC-Europa	Consortium of six leading (HPC) infrastructures and five centres of excellence providing transnational access; EU project.
ITER	Joint international research and development project that aims to demonstrate the scientific and technical feasibility of fusion power. Also used as the name for the reactor.
MB	Management Board
MoU	Memorandum of Understanding.
NDA	Non-Disclosure Agreement. Typically signed between vendors and customers working together on products prior to their general availability or announcement.
PACE	Partnership for Advanced Computing in Europe; old Project Acronym.
PRACE	Partnership for Advanced Computing in Europe
PP	Principal Partners
PPC	Principal Partners Committee
RI	Research Infrastructure
SE	Societas Europaea
TB	Technical Board
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.
TCO	Total Cost of Ownership. Includes the costs (personnel, power, cooling, maintenance, ...) in addition to the purchase cost of a system.



## Executive Summary

This report describes and compares the different options for a legal form for the PRACE research infrastructure (RI), which to be established after the successful completion of the PRACE project. The goal of the PRACE project is the foundation of a persistent pan-European HPC Research Infrastructure.

It is the first of three deliverables on the legal form for the future PRACE Research Infrastructure. The following two being the draft contract for the legal entity due in project month 15 and the final signature ready contract for the PRACE Research Infrastructure due in project month 24.

In this work, the results from the workshop on “legal forms of research infrastructures of pan-European interest” within the European Strategy Forum on Research Infrastructures (ESFRI) and the proposal for a Council regulation on the Community legal framework for a “European

The different options ranging from international treaties, European legal forms to national law are described and compared. The Basis for this comparison are criteria, which were selected to meet the specific needs and requirements of the PRACE RI.

This deliverable provides the PRACE Management Board (MB) and the Principal Partner Committee (PPC) with an overview of possible legal forms for the future PRACE research infrastructure. The findings can be summarized as follows:

The establishment of an international legal entity for the PRACE RI based on international treaties within the project duration of two years is unlikely because of the lengthy and complicated international negotiation process.

ERI by design seems quite suitable for RI's like PRACE. All the special requirements of a distributed pan European research infrastructure are taken into account and a decision will be need ultimately based on the final valid Council regulation. However, the availability of the new ERI legal framework in time for PRACE is not yet assured, as the proposal still has to be approved by the European Council.

In the case ERI will be not available for the PRACE RI, a national legal form has to be selected. Different national legal forms from the Principal Partners countries as well as Belgium were considered and rated.

## 1 Introduction

The PRACE project has the overall objective to prepare the creation of a persistent pan-European HPC service. The work of PRACE is organized in eight inter-linked work packages (WP). WP2, “Organisational concept of the Research Infrastructures”, focuses on the preparation of a comprehensive legal and administrative framework for the implementation phase of the research infrastructure. Furthermore WP2 deals with the specification of funding and usage strategies, the establishment of a peer-review process, the establishing of links with the HPC ecosystem, and the development of the operation model. Within WP2 task 2.1 has the mission of defining the legal form of the research infrastructure.

This document takes the analysis already done by the ESFRI Working Group on Legal and Financial Issues for European Research Infrastructures [10], by The European Conference on Research Infrastructures [11] and by the HET High Performance Computing in Europe Taskforce [12] into account. The report on options for a legal entity is closely linked to deliverables D2.2.1, “Report on Analysis of adequate governance structure” and D2.3.2 “Usage model document”.

This document is the first deliverable of task 2.1 and its purpose is the overview of available legal forms, which could cover the specific needs of PRACE as a European Research Infrastructure. Its legal form may be based on a range of options from International treaties to European and national legal forms. Its intended audience is the Management Board of PRACE, who will decide on the final legal form.

This document is structured as follows: Firstly, in chapter 2 the purpose of the PRACE RI is explained. Chapter 3 describes the different criteria for the selection of a suitable legal form. Chapter 4 is dedicated to possible legal forms under international, community, and national law. The comparison and analysis of the different legal forms based on the previously defined criteria is the content of chapter 5.

Since tasks 2.1 legal form, 2.2 organisation and 2.3 funding and usage of WP2 are closely related and need to establish a common language to discuss the structure of the PRACE operations and the anticipated relations between PRACE and its funding partners, a common section including definitions and main parameters has been developed. It is included as Annex 5.7 “Operation Models for PRACE” in this document, and also in deliverables D2.2.1 and D2.3.2.”. Definitions included in this annex concern the “Cycles Model”, the “Operating Model”, and indicate major interdependencies between the partners”.

## 2 The Purpose of PRACE

The aim of the Partnership for Advanced Computing in Europe (PRACE) organisation will be to deliver world class HPC services to scientific and industrial user communities in Europe. PRACE will consist of three to five distributed centres hosting world-class computers, the tier-0 systems. PRACE will provide a persistent pan-European High Performance Computing (HPC) service and infrastructure, which will be managed as a single non-profit European entity. This covers the planning, financing, acquisition, housing, operation, maintenance, and support (including user support) of the Tier-0 systems including their periodic renewal and continuous upgrade. PRACE should also assure that these systems are easily accessible to European users through technological (e.g. grid technologies) and political/social integration (through the creation of effective lines of communication with stakeholders) into a European HPC ecosystem.

PRACE will provide access to a number of different Tier-0 architectures and platforms in order to optimally cover the different scientific domains and application classes. This infrastructure will be distributed across different countries. PRACE will assure that at least one Tier-0 system be procured and deployed by 2010, and that more systems of comparable relative capability be procured before the end-of-life of the first system.

PRACE will employ effective mechanisms for the allocation of computing time to avoid a fragmented use of the top level computers and speed up adaptation and development of codes and algorithms.

PRACE will collaborate with the European IT-industry to influence the development of emerging hardware and software technologies for promising future architectures. As mentioned above, the infrastructure will be complemented with network and grid access, and the services required to enable applications. These include development of parallel application software expertise, packages, and data handling.

PRACE will represent a significant step forward for the European Research Area as a world-class infrastructure which cuts across disciplines and will address major challenges through its support of the best research in Europe. High-performance computing has a strong impact in terms of maintaining the strategic competitiveness of Europe and increasing its attractiveness for foreign or returning European researchers and for supporting industrial development.

## 3 Criteria for the Selection of a Suitable Legal Form

In order to select the most suitable legal entity for the PRACE Research Infrastructure, a set of criteria has been defined.

The available legal forms will be examined and ranked according to the criteria listed and explained below.

Criterion	Maximum Rating
Time to Implement	
Non Profit Objective	
Recognised Legal Personality	
European Character	
Limited Liability	
Suitable Governance	
Ownership and Share Transfer	
Compatiblity with Funding Model	
Flexible for Usage	
Tax Exemption	
Flexible Procurement	
Cost to Set up	
Personnel	
Staff Privileges	
Designed for Research	

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

The above table lists the features which are seen as important for the legal form for PRACE. Features are listed in order of importance with a maximum of six points being given to those seen as essential at one end of the scale, and a minimum of one point being given to those which are merely desirable. As many of these criteria can be fulfilled to a greater or lesser extent the points given to each form for a particular category may vary. E.g. for the criterion Time to Implement a form may be very quick or very slow to implement. If it's very slow it would receive no points, if it is very quick, the maximum.

The list was created from the combination of various sources: the analysis of existing legal forms made by the ESFRI working groups and detailed in various reports (see bibliography); work done within WP2, including consultation with the legal departments of various HPC centres and the subsequent feedback on this work from the Management Board; input from conversations with national ministries, and an analysis of the proposal for a council regulation on the ERI. It should be stressed that the results displayed in the comparative table are preliminary, pending further work by legal experts.

### 3.1 Time to Implement

This assesses the time to establish the legal entity. Since the target is to create the legal entity by 2010 it can have the maximum value.

### 3.2 Non Profit Objective

It is important that the legal form is not conceived purely for commercial purposes, but neither should it exclude relations with industry.

### **3.3 Recognised Legal Personality**

It is absolutely essential that the organization is able to enter into legal transactions such as holding property or entering into debt, and that the chosen legal form is recognized by all EU countries.

### **3.4 European Character**

As pointed out in the ESFRI discussions, following the territorial sovereignty rule, if PRACE were to take on a national legal form, it would be subjected to national law of the country where it is located and automatically incorporated into the national legal framework of the host state, with direct and full submission to its authorities, rules, regulations and jurisdictions. That particular situation would result in a legal and possible political predominant influence of the Host State on that institution, which would weaken the aim of creating a truly European endeavour.

### **3.5 Limited Liability**

While there are already existing examples of successful European RI using national legal entities without limited liability, various national funding agencies, who will guarantee the continuous funding of the PRACE RI have expressed the importance to them of limited liability.

### **3.6 Suitable Governance**

The legal form should allow the establishment of a governance structure that is robust with a clear line of authority and responsibility covering scientific, technical and administrative aspects of the facility. The shareholders should be represented either directly or through agents with effective minority protection rules. The accounting rules and budget discipline should be clearly defined.

### **3.7 Ownership and Share Transfer**

As the degree of participation by each country may change over time due to political, economic or scientific reasons, a legal form with a flexible ownership framework would be desirable with easily transferred shares, possibly with compensation for accrued value in the Legal Entity.

### **3.8 Compatibility with Funding Model**

It is important that the legal form chosen is easily compatible with the selected funding model for PRACE.

### **3.9 Flexible for Usage**

The legal form should be able to accommodate a possible transition of the PRACE organization from the cycles model to the operator model.

### **3.10 Tax Exemption**

Tax exemption is important from a financial point of view. PRACE will employ a continuous procurement policy, and an annual budget of at least 170M Euros is foreseen. The legal entity needs to be able to establish tax efficient vehicles for these individual procurements.

### **3.11 Flexible Procurement**

It may be convenient for the PRACE entity, in certain cases, to engage in the procurement of immature technologies which are seen as key to the future of European HPC. This pre-competitive procurement (as mentioned in the project DoW) is not possible under present European and national procurement laws. So it may be appropriate that PRACE be exempt from national and European procurement rules for certain situations. This does not affect the fact that PRACE should always ensure that it follows appropriate rules in all procurements in order to get the best value.

### **3.12 Cost to Set up**

The length of the negotiation period and extent of the involvement of legal services can greatly affect the cost of setting up a legal entity.

### **3.13 Personnel**

The PRACE research infrastructure will need personnel. However, the number and location of the personnel required will depend on the final usage model. In the case of the Cycles model only the personnel for the headquarters is required, as the operation of the tier-0 systems will be realised by the PRACE partners. This small group of PRACE staff will mainly coordinate the national HPC strategies and take care of the European peer review process. From a legal point of view this won't cause problems, since this staff will probably be located at the PRACE headquarters and for all staff the same national employment and staff regulations will be applied.

In the case of the Operating model, a large number of PRACE personnel in different places in Europe will have to be managed. The number of personnel in the headquarters will be higher than in the Cycles model, because there will be important additional tasks to be managed. In addition to coordination and peer review, staff will be needed for procurement, human resources, legal support, business development, operations, education and collaboration, applications and possibly computer science and other R&D. The employment of personnel for the headquarters will probably cause no problems. But to employ all PRACE staff in different countries under the same or at least comparable conditions, will be a real challenge. Either the staff will be employed by the PRACE headquarters and seconded to the different tier-0 HPC

centres or the staff will be employed by the different HPC centres directly. The question of expatriation allowance (compensation given to staff who move from abroad to take up a position) should be handled very carefully to guarantee a fair and reasonable regulation. A further general problem with PRACE staff is correlated to the frequent renewal of the PRACE infrastructure. In Germany e.g. there will be up to three tier-0 centres, which will host the tier-0 supercomputer sequentially. Local staff for the operation will be either only temporarily or has to move every two years.

### **3.14 Staff Privileges**

HPC centres around Europe are well aware of the many problems they are faced with when it comes to hiring and retaining qualified and experienced personnel. Staff privileges such as exemption from income tax would help PRACE to attract and retain the best staff.

### **3.15 Designed for Research**

If the legal form is especially designed for research it will be able to incorporate the special features of these types of organization such as its non-profit nature etc.

## 4 Potential Legal Forms for PRACE

Three different legal frameworks have been evaluated as options for the new pan-European Research Infrastructure PRACE: International, European, and National ones.

### 4.1 International Legal Forms

Many well known examples of pan-European and international research infrastructures like CERN, EMBL or ESA and ESO demonstrate how an international legal entity may be appropriate as an option for new pan-European research infrastructures. These RI have the status of an international organisation and consequently many advantages concerning tax and procurement regulations. However, the creation of an international RI requires a long preparation phase. Intensive lobbying activities are necessary to convince the Governments of the importance of the RI and need to establish it as an international RI. In the end, the international RI is created as legal entity through intergovernmental treaties which are deposited at the UN.

Preparation for the European Molecular Biology Laboratory (EMBL), for example, started in the year 1962. One year later the European Molecular Biology Organisation (EMBO) was founded in order to establish the European molecular biology laboratory. As a next step the European Molecular Biology Conference was founded in the year 1968, associating 14 governments with EMBO, providing the organisation with stable funding and scientific independence. EMBL became a legal entity only in the year 1974, after the decision of France to ratify the EMBL Agreement. In total 12 years were taken to establish EMBL as an international legal entity with international treaties. Since the most important result of the PRACE project should be the creation of a legal entity within two years, it is unlikely that an international legal entity can be concluded in the project duration.

### 4.2 European Legal Forms

European legal forms have already been thoroughly investigated during the ESFRI discussion [2] [3] [4]. A short overview will present the established European legal forms. However, as ESFRI concluded none of these legal forms is really predisposed to serve as the legal form for a new pan-European research infrastructure. The European Joint Undertaking is a European legal form, which was used recently for some European research infrastructures, but with a long preparation phase. The Joint Undertaking is based on Article 171 of the European Community Treaty<sup>1</sup>, like the new Community Legal Framework for a European Research Infrastructure (ERI). With the creation of the ESFRI list an initiative from the European Commission to implement a new European legal form was started. The ERI should help to establish new pan European Research Infrastructures. It should be a legal framework which could be used to easily create a new European Research Infrastructure as public private partnerships running as Joint Undertakings. ERI [5] was passed by the Commission on 15 July 2008. It is expected that the legal framework could be adopted by the EU Council of Ministers in December and would become effective during the first quarter of 2009. This very promising legal framework would be a good choice for the PRACE RI because it is especially

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<sup>1</sup> European Community Treaty Article 171: “The Community may set up joint undertakings or any other structure necessary for the efficient execution of Community research, technological development and demonstration programmes.”



designed for pan-European research organisations and has very favourable solutions for the issue of the European non-profit character of the organisation, can accommodate its distributed nature, tax exemption, etc. However, since it is not yet available, alternatives have to be considered.

### *EEIG – European Economic Interest Grouping*

The EEIG legal form was established as one of the first legal instruments to enhance transborder cooperation, especially cooperation concerning economic activities.

In addition to its neutrality, an advantage of the EEIG is that due to its regulation by European law it is known and accepted in every European Member State. Furthermore an EEIG is easy to establish and does not require any minimum seed money.

However, for the purposes of PRACE the EEIG is very restricted in its objectives. The EEIG is reduced to subsidiary actions to the main activities of its members, its purpose is "to facilitate or develop the economic activities of its members and to improve or increase the results of those activities; its purpose is not to make profits for itself" (Article 3 No 1 of the Regulation 2137/85/EEC). Furthermore the number of possible employees of an EEIG is limited to 500 (Article 3 No 2 (c) of the Regulation 2137/85/EEC). But the main disadvantage is that membership of an EEIG triggers an unlimited joint and several liability for debts and other liabilities of the legal entity. Additionally the Council Regulation establishing the EEIG does not provide regulations on many important questions, e.g. labour law. At this point the Council Regulation refers back to national law. Lastly the EEIG may not suit the PRACE purposes because it does not allow non-European institutions to take part.

### *SE – Societas Europaea*

The Council Regulation for SE [13] sets up a European public limited-liability company (plc) designated for companies with economic orientation. It was established to facilitate cross-border merger. An SE is formed by means of a merger of at least two companies, having their registered offices and head offices within the Community and governed by the law of different Member States, by the formation of either a holding or a subsidiary or by the transformation of an existing plc which has a subsidiary in another Member State.

Seed capital of 120.000 € is necessary. Due to this fact, the member's liability is limited to its deposit.

In the same way as the EEIG, the SE is a European legal entity, it has similar advantages: the high acceptance by the Member states and its neutrality. With a Directive the Council regulated the involvement of employees, but common rules concerning tax issues are excluded from the scope of the European regulations. Thus national tax law applies. In addition to the fact that establishment and structure are quite complicated (the capital of an SE is divided into shares), the SE addresses mainly the needs of large, already established industrial companies rather than the needs of a European research infrastructure which is just being established.

### *EGTC - European Grouping of Territorial Cooperation*

The legal form of the EGTC came into being on August 1, 2007. The relevant Council Regulation 1082/06/EC is based on Article 159 of the EC Treaty. Its purpose is, "to facilitate and promote cross-border, transnational and/or interregional cooperation ... with the exclusive aim of strengthening economic and social cohesion" (Article 1 No 2 of the Regulation 1082/06/EC). More precisely, the objectives of the regulation, stated in its preamble and its Article 7, are:

- to reduce difficulties in "implementing actions within the framework of differing national laws and procedures";
- to provide a solution to the inadequacy of existing instruments ("existing instruments, such as the EEIG, have proven ill-adapted to organising structured cooperation under the INTERREG initiative");
- to complete and not circumvent the framework provided by the Council of Europe;
- to facilitate territorial cooperation within and outside Structural Funds, the main task being the implementation of Territorial Cooperation programmes or projects.

An EGTC can be formed by Member States, regional or local authorities, associations or any other public body located on the territory of at least two different Member States.

As with all the European legal forms, the EGTC has the advantages of high acceptance by the Member States and neutrality.

However, its purpose is very limited, and does not fit with a research structure. Furthermore there are restrictions for the participation of non-European Member States.

### *European Joint Undertaking*

Following Article 171 of the EC Treaty the Community "may set up joint undertakings or any other structure necessary for the efficient execution of Community research, technological development and demonstration programmes." Every establishment of a European Joint Undertaking requires an initiative of the European Commission and case by case decisions by the Council, following the procedure of this Article 171 of the EC Treaty, leading in case of success to its adoption by the Council in form of a Regulation.

The first example of a European Joint Undertaking in the field of research is the new financial instrument of FP 7, the Joint Technology Initiative (JTI). There is no precedent for public-private partnerships set up under Article 171 of the EC Treaty in the field of research.

JTIs are legal entities; private-public enterprises on a long-term basis providing a combination of private and public funding for selected fields of technology. The aim is to increase the competitiveness of European industry in these technology fields. In all JTIs, the Community (represented by the Commission) is a founding member and is involved in the decision-making process.

The initiatives mainly result from the European Technology Platforms which were set up during The Sixth Framework Programme for research and technology development. Six areas where the setting up of a JTI could be of particular relevance have been identified in the 'Cooperation' Specific Programme of FP 7. These will serve as test cases, on the basis of which this new mechanism can be assessed. Therefore, at this stage, it is not intended to propose further initiatives; however the situation could be reconsidered during the mid-term review of FP 7.

One advantage of the European Joint Undertaking is, that the statutes or the articles of association of a Joint Undertaking are not pre-defined anywhere. Therefore it is a legal instrument which theoretically leaves a large amount of freedom to the founding members.

But a significant disadvantage of the European Joint Undertaking is the complicated founding procedure (Commission initiative, adoption by the Council). The procedure requires repeated discussions at Council level. For the stakeholders and for the Commission (who will need to organise a long preparatory phase before each initiative), this option will not be simple nor easy.

*European Research Infrastructure*

Although the ERI is not formally adopted as a legal entity, in order to include it in this document we base the description below on the document “Proposal for a Council Regulation on the Community legal framework for a European Research Infrastructure” of July 16, 2008 [5]. For clarity, we refrain from using conditional phrases and tenses concerning the ERI availability.

The legal framework for a European Research Infrastructure is designed to facilitate the joint establishment and operation of research facilities of European interest between several Member States and countries associated to the Community R&D Framework Programme. It is being developed in response to requests from the Member States and the scientific community, because the available national and international legal forms are not fully adequate.

A major difficulty for setting up new European research infrastructures, apart from scarcity of resources and the complexity of technical and organisational issues, is the lack of an adequate legal framework allowing the creation of appropriate partnership with partners from different countries.

Recent work carried out under the auspices of ESFRI has recognised that existing legal forms under national law (e.g. the French *société civile*, the German *Gesellschaft mit beschränkter Haftung* (GmbH), the UK limited liability company (Ltd) or the Dutch *stichting* (foundation)) do not fulfil the needs of these new research infrastructures. The analysis is similar for existing legal forms under international or Community law (e.g. international / intergovernmental organisations, European Economic Interest Groupings). ESFRI thus identified a need to develop a dedicated Community legal framework for setting-up European research infrastructures involving several Member States.

Complementing national or inter-governmental schemes, the proposed framework regulation provides a common legal framework based on Article 171 EC Treaty. It sets out the main characteristics of European Research Infrastructures (ERIs), as well as clear procedures by which this status will be conferred by the legislator.

An ERI is a legal entity with legal personality and full legal capacity recognised in all Member States. It is based on membership: its members (Member States, third countries and intergovernmental organisations) jointly contribute to the achievement of the objectives of an ERI, primarily the establishment and operation of a research infrastructure of European importance. Its internal structure is very flexible, allowing the members to define, in the Statutes, their member rights and obligations, the organs and their competences and other internal arrangements. The liability of the members for the debts of the ERI will in principle be limited to their respective contributions; flexibility will however be allowed in the statutes to modify such arrangements. The applicable law is Community law, the law of the State of the statutory seat or of the State of operation regarding certain safety and technical matters. The Statutes and their implementing rules must comply with such applicable law. The ERI shall also be considered as an international body or organisation in the sense of the directives on value-added tax, on excise duties and on public procurement; it shall be thus exempted from VAT and excise duties and its procurement procedures shall be out of the scope of the directive on public procurement.

The draft Regulation is very short and leaves most of the internal arrangements for the planned infrastructure up to the members of the European Research Infrastructure, i.e. Member States, third States and intergovernmental organisations. The applicable law will be mostly the national law of the country of statutory seat or of operation.

### General Context

The experts meetings under the auspices of ESFRI concluded that the existing legal frameworks available in Europe were not ideally suited for the creation and operation of Research Infrastructures. In particular, several difficulties were recognised, like the reluctance from partners in certain states to become part of a legal entity governed by another state's laws, insufficient flexibility of International Organisation, excessive duration of the creation process, etc etc.

The ERI has therefore been designed to alleviate these shortcomings. It is not required that all ESFRI Roadmap infrastructures select this legal form.

The ERI has therefore been designed to alleviate these shortcomings. It is not required that all ESFRI Roadmap infrastructures select this legal form ([5] page 11, point 9).

The ERI legal form is reserved for pan European research infrastructures, operating mostly on a non-commercial basis. The ERI must carry European Research activities, under the terms of ERI Art. 3 and EC Treaty Art. 171 concerning joint undertakings or structure necessary for the execution of Community research, technological development and demonstration programmes. Openness to the European research community is required.

The counterpart is that the ERI shall have a favourable status with respect to a) being recognised with full legal capacity in all Member States, b) being recognised as an international body, c) being granted extensive exemption of taxes by Member States.

### Legal Basis and Regulatory Function of the Commission

The ERI is an ad-hoc legal form giving full legal personality and capacity, justified and implemented on the basis of EC Art. 171, therefore the Commission has 2 roles:

- a) Ensuring the ERI is used in conformance to EC Art. 171, to perform research of interest to the EC,
- b) Ensure that registration and publicity of the legal entity and of its responsible partners and managers is performed in a way which permits the competent jurisdictions to protect third parties which deal with the ERI. This in turn is the basis for the capacity of the ERI to contract with third parties.

The second role is quite standard, although the determination of applicable laws and competent jurisdictions may be complex, and the ERI may have to bear the cost to deal with several jurisdictions and administrations. Furthermore, ERI Art 15-3, clarifies that the Commission bears no liabilities with respect to debts, and acts in some sense as the registrar and regulator. Likewise, ERI Art. 17 (3) and (4) make the ERI, and therefore its partners and/or managers, responsible for declaring insolvency to the European Commission. <sup>(2)</sup>

The first role explains the rather extensive nature of the extract from the ERI Statutes for which the European Commission has approval authority, as described in ERI Art. 9 and

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<sup>2</sup> Further details on insolvency in the European framework appear to be complex, see “ F. Lefebvre, Union Européenne, Procédures d’insolvabilité”.

Annex. In some sense, using the ERI legal form implies implementing a facility with scope the European Research Community.

Applicable laws and jurisdiction are defined by ERI Art. 16. This establishes a hierarchy encompassing European Community law, law of the statutory seat, law of the operating site<sup>3</sup>.

### **Major Characteristics of the ERI**

**Partnership** is restricted to Member States, third countries and inter-governmental organisations, under the condition that Member States jointly hold the majority of voting rights in the General Assembly and that 3 different Member States are involved. These may be represented by one or more public entities or private-entities with public service mission.

### **Enforcement of Contracts**

The ERI Art 16. defines competent jurisdictions for litigation between the ERI and its members, the ERI and third parties, and in all cases where the European Commission is a party.

### **Partner Liability**

ERI Art. 15 permits the partners to limit their liability to their respective contribution, or to specify a more extensive liability in the Statutes. This permits the selection of the option which will best fits best the requirement of being able to contract with third parties.

### **Governance, Organisation and Responsibilities**

The ERI has minimal constraints (required general assembly of partners and executive body comprising a Director or a Board of Directors) and is able to define much of these in a customised fashion in the Statutes.

### **Taxes**

The ERI should be exempted from taxes to the largest possible extent by all Member States. It is probably worthwhile to investigate this in more detail and the mechanisms or authorisations required by the relevant Member State administrations.

### **Assets**

The ERI Art. 6 (2), permits the ERI to acquire, own and dispose of such assets. However, it seems useful to clarify under which terms the ERI may dispose of assets it creates like new intellectual property. Likewise, the ability of the ERI to own shares of other legal entities should be fully understood.

### **Work Required by PRACE**

Since there is no available experience or legal practice regarding the ERI, the PRACE project will need to perform several detailed investigations, using legal expertise available internally, externally or by consulting with the European Commission. It might happen that some of these investigations, and in particular querying legal authorities, cannot be performed effectively before the adoption of the ERI Council Regulation.

The list of items below is purely indicative. It is provided here to facilitate the work and the interaction with the European Commission.

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<sup>3</sup> The practicality and complexity remains to be evaluated.

- Selection of a country where to establish the statutory seat will be established. In particular in view of ERI Articles 16 “Applicable law and jurisdiction” (1-a), (1-b) and (3). It should be noted that derogation (1-e) which makes applicable the law of the State where the ERI operates does not mention employment regulations. It might also be necessary to fully ascertain how the ERI will be handled by the relevant jurisdictions when applying ERI Art. 16 (1-b), (1-e) and (3).
- Qualifications that are required to be eligible as a representative for a Member State in an ERI.
- Clarify implications of ERI Art 16 (2) & (3) to obtain a more practical understanding, covering the most typical cases.
- Clarify tax, employment position.
- Constraints and controlling measures applicable as a consequence of being publicly funded.

Since no pre-existing body jurisprudence exists regarding the criteria the European Commission may use when examining applications and modifications of ERI Statutes, it is probably wise for PRACE to conduct early exchanges with the European Commission to ascertain the basis on which such examination criteria will be established. Similar enquiries with Member States administrations might also be required.

### 4.3 National Legal Forms

The different national forms available for pan-European Research Infrastructures are grouped into companies, foundations and associations. A brief description is given for each of them.

#### *Companies*

##### **Limited liability Company (GmbH) - Germany**

The German limited liability Company constitutes a legal entity. It may be established for every acceptable purpose. Its liability is limited, only the assets of the Company itself can be held liable. Mandatory bodies are the general assembly of shareholders and the management directors. The limited liability Company can be founded in every European country so the acceptance is very high. The national regulations concerning a company with limited liability do not differ too much so the partners can understand foreign regulation very easily.

##### **Private Company limited by Shares - UK**

In the UK Private companies limited by shares are regulated by Companies House; which in turn is an Executive Agency of the Department for Business, Enterprise and Regulatory Reform. In order to form a company the following are required to be submitted to Companies House: Memorandum of Association; Articles of Association; names of directors and company secretary; and a cheque for £20. It is easy to set up such a company and 300,000 new companies are registered with Companies House each year. These companies have limited liability for shareholders and are liable to UK tax, mainly VAT for not-for profit organisations (although depending on the shareholders some companies may be exempt from VAT). The accounting rules and budget discipline are clearly defined and there is flexibility to expand the share capital to accommodate new partners.

The ease of set-up, the limited liability for shareholders and the flexibility to expand the share capital to new partners are all advantages of this form of legal entity. The main disadvantage for PRACE would be the potential exposure to the UK company tax system.

### **Société Civile (Company for non-commercial purpose) - France**

The Société Civile is a legal entity, formed between several partners. The company becomes a legal entity when it is registered with the French company register (“Tribunal de Commerce”). The objects of the company are defined in the registered statutes, and must be of civilian nature. The articles of the company define the rules for the designation of the manager or managers and the method of organization of the management. The French Tax Authority allows that Société Civile has commercial activities not exceeding 10% of the total activities. Therefore, this commercial activity permits to develop partnerships with industrial users, under which the industrial users will pay for a service. There is no legal minimum for the registered capital, an initial capital is required but there is no minimum amount specified. The contributions of the contracting members come in kind, cash and staff. The shares and procedures are set out in the statutes but the budget is decided on a yearly basis.

Under the French Tax system, the taxation in a Société Civile is very attractive because there is no company tax, no corporate tax and no local authority rates. Each member pays taxes on its profits according to its own status (“transparent taxation”). The Societe Civile is exempted of company taxes when the commercial profits represent less than 10% of the resources of the company. The Société Civile has also the faculty to choose the rate of value-added tax (VAT) but it’s depending of its activities (civil or commercial). This choice permits the purchase of computer equipment without VAT, thus less minimising costs.

With regard to third parties, partners are liable indefinitely for debts of the partnership in proportion to their share in the capital of the partnership on the date when falling due or on the day of insolvency. Partners are personally and indefinitely liable, but without joint and several liability, for payment of debt in proportion to their participation in the nominal capital. Thus, there are no joint and several liabilities of shareholders/partners. Therefore, in relationships with third parties, a manager binds the partnership through transactions which fall under the objects of the partnership, and which are concluded in the partnership’s name. Each manager is liable individually towards the partnership and towards third parties, either for violations of statutes and regulations, or for an infringement of the articles, or for faults committed in his management.

There’s only one obligation in the governance of a Société Civile. The French law imposes the constitution of a General meeting of shareholders to ensure their rights in the partnership. Several aspects of the general meeting of shareholders are defined in the Articles, including voting rules. Otherwise, the governance organization is only described by the Articles and not by the Law. The shareholders define freely in the Articles the organization’s governance, and the powers of the managers.

### **Sociedad Civil (Company for non-commercial purpose) - Spain**

Sociedades Civiles (Associations) have a legal personality which can be non-profit, for the public good and which undertake activities in social, cultural or scientific fields. They have a legal personality and can undertake economic activity as long as it is compatible with their non-profit objectives. With regard to founding the legal entity: the sociedad civil can be set up by individuals or legal entities and its constitution can take place in the presence of a notary or

not. The sociedad civil must be registered in the register of associations and an annual register of accounts must be kept.

Bodies of the sociedad civil include: Board of Members of the association. There must be a governance organ, the functions of which may be delegated to one person. There is no minimum seed capital, but sufficient capital is required in order to act. Partners may be public or private and without limit on number. The entry of a new member is very easy. Liability of the members is unlimited.

Sociedades civiles pay tax as a normal company. However, they can apply to be declared of public interest in which case they enjoy the same fiscal status as a foundation. i.e. they do not pay company taxes, except on the economic activity realized and even then only at a rate of 10%. Those who give money to the sociedad civil also receive tax exemptions. There are various exemptions which apply to the people who participate in the associations. The sociedad civil may hold intellectual property, both ceded by its members and created through its own activity. It may economically exploit said intellectual property. Regulation for the sociedad civil is stable and similar to that of the rest of the EU countries and the legal form is recognized by all EU countries. Main advantages are tax benefits, access to advantages and subsidies, and the possibility to engage in economic activity with low company tax.

### *Foundations*

#### **Stichting (Dutch foundation) – The Netherlands**

A foundation in the Netherlands (Stichting) is a legal person created through a legal act. This act is usually either a notarised deed (or a will) that contains the articles of the foundation which must include the first appointed board. No government authority is involved in the creation or authorization of a foundation; it acquires full legal capacity through its sole creation. A foundation has no members and its purpose must be stated in its articles, using capital dedicated to its goal. The foundations are defined in the Dutch Civil Code (Burgerlijk Wetboek), Boek 2 Art 285-304. It is not restricted to the Netherlands that a foundation serves a purpose of general interest, but its official goal cannot include making payments to anybody, except for charitable causes. The foundations are governed and represented by a board that is responsible for its administration, this board has not a requirement for specific number of members.

Art. 2:289 of the Civil Code establishes that all foundations must be registered in the Register of Commerce or "Handelsregister". Commercial activities are allowed if they are within the purpose of the foundation and are taxed. Board members can be held liable for the foundation, civilly as well as criminally.

The Dutch Tax Service can declare an institution to be an "institution for general benefit" (*algemeen nut beogende instelling*, ANBI), with tax benefits. Often, but not necessarily, this is a foundation. Conversely, not every foundation qualifies.

#### **Fundación (Foundation) Spain**

Foundations are always non-profit, for the public good and which undertake activities in social, cultural or scientific fields. They have a legal personality and develop actions which



contribute to the public good as well as economic activity as long as this does not exceed 40% of their income. The foundation must be set up by Individuals or legal entities and its constitution must take place in the presence of a notary (who must certify the founding act and the articles of the foundation). The foundation must be registered in the register of foundations and an annual register of accounts must be kept.

Bodies of the foundation include: Board of members of the foundation. There must be a representative of each member of the foundation and decisions are taken by majority. The board may delegate power of attorney to one of its members. There is no minimum seed capital, but sufficient capital in order to act is required and if the foundation is dissolved, the remaining capital must be given to other non-profit entities or to the State. Partners may be public or private and without a limit on their number. The entry of a new member is very easy. Liability of the members is unlimited but in any case, as the foundation is not a commercial entity, is not reasonable to take on responsibilities apart from penal and personal which are always unlimited anyway.

Foundations enjoy a very favorable fiscal status, and do not pay company taxes, except on the economic activity realized and even then only at a rate of 10%. Those who give money to the foundation also receive tax exemptions. There are various exemptions which apply to the persons who participate in the foundation. The foundation may hold intellectual property, both ceded by its members and created through its own activity. It may economically exploit said intellectual property. Regulation for foundations is stable and similar to that of the rest of the EU countries and the legal form is recognized by all EU countries. The main advantages are tax benefits, access to advantages and subsidies, and the possibility to engage in economic activity with low company tax.

### *Associations*

#### **Association (French “loi de 1901”) - France**

The 1<sup>st</sup> article of the Law [14] provides that: “the association is a contract between 2 or several persons which agree to put together their knowledge and activities in the other way than profit sharing”. The Association is a legal entity. The Association obtains its juridical personality when it’s registered with the French prefecture. It’s a very flexible governance structure with no formalism. As a Société Civile, the French Tax Authority allows Associations to have commercial activities up to the limit of 10% of their total activities. Thereby, this commercial activity permits to develop partnerships with industrial users. There is no obligation to have capital. It’s a non profit organization.

#### **German Association (eingetragener Verein) - Germany**

A registered association consists of a group of people, who have joined together to implement a common purpose. Mandatory bodies are the general assembly of members and the Board of Directors. Its continuance is independent of the change of the members. In general only the association itself can be held liable up to the amount of its assets for third party damages if members of the association have acted properly within the association. If they act improperly they can be held liable themselves. The association is liable for all damages caused by the Board of Directors in performing its duties. Members of the Association are not personally liable for liabilities established by the association through its board of directors; their liability is limited to their contribution. The Board of Directors carries liability for faulty management.

The advantages of a German Association are: limited liability, relatively easy establishment, clear proprietary accrual between members and association, flexible structure and the fact that no capital is required.

### **Belgian Association (Association sans but lucrative; A.S.B.L.) (= non-profit organization)**

Belgian Associations or *Association Sans But Lucratif* (A.S.B.L.) [14] legal form can be used for non-profit and all partnerships which don't undertake industrial or commercial activities. The Articles of the ASBL must include: Legal Form and social denomination, name of the ASBL, purposes of the ASBL, name of the shareholders, rules of the general meeting of shareholders and financial contributions. The Articles are registered by a solicitor. The A.S.B.L is e legal entity. The partnership is legally created when it's registered with the Belgian state and the head office must be in Belgium..

Governance: The general meeting of shareholders may: modify of the articles, appoint directors, appoint auditors, adopt the budget, and end the partnership. Board of directors: The Board of directors manages the ASBL and represents it in all legal and extra-legal documents. Accountancy: The accountancy is the same as a commercial firm if the ASBL has at least five full-time equivalent workers, more than 250,000 € of receipts net of tax, or more than 1,000,000 € of assets.

### **Belgian international Association (Association internationale sans but lucrative; A.I.S.B.L.) (= non-profit organization)**

The Association internationale sans but lucratif (A.I.S.B.L.) [14] is a *non-profit partnership* similar to the ASBL.

The A.I.S.B.L. is a legal entity and can be legally created if it does not undertake industrial or commercial activities, if it is a non profit and if it works towards the international interest. The partnership becomes a legal entity when it's registered as a Belgian organisation. The Head office must be in Belgium.

The Articles of the AISBL must include: Legal Form and social denomination, name of the ASBL, purposes of the ASBL, name of the shareholders, rules of the general meeting of shareholders and financial contributions. The Articles are registered by a solicitor.

The other provisions of the AISBL are the same as the provisions of the ASBL.

Since the two forms of the Belgian Association are nearly identical only the A.I.S.B.L. is considered for the following analysis.

## **5 Analysis of Options**

The table below lists the legal forms discussed in the document, and rates each one according to the measure in which they fulfil the criteria which were selected as essential or desirable for the legal form of the new PRACE entity.

	Total:	Designed for Research	Staff Privileges	Personnel	Cost to Set up	Flexible Procurement	Tax Exemption	Flexible for Usage	Compatible with Funding Model	Ownership and Share Transfer	Suitable Governance	Limited Liability	European Character	Non Profit Objective	Time to implement
<b>INTERNATIONAL FORM</b>															
International treaty															
<b>EUROPEAN FORMS</b>															
EEIG															
SE															
EGTC															
European Joint Undertaking															
European Research Infrastructure															
<b>NATIONAL FORMS</b>															
Limited liability Company (GmbH) DE															
Private limited Company UK															
Société Civile FR															
Sociedad Civil ES															
Stichting NL															
Fundación ES															
Association FR															
German Association DE															
International Belgian Association BE															

**Table 2: Matrix of different legal forms and rated criteria<sup>4</sup>**

**Important Note:** The marks given in the table are provisional, pending deeper analysis by specialized lawyers who win the tender for legal services, to be published soon.

Note to ESFRI PPs: The ranking based on the scores may vary of each RI depending on the weight each criterion receives.

<sup>4</sup> The forms have not yet been given points on some criteria pending further analysis by specialist lawyers.

Bearing in mind the above table, the legal form which appears to come closest to fulfilling all of the criteria needed by the future PRACE organization is the ERI. The creation of an International Organisation would be ideal for PRACE but international negotiation is usually lengthy, expensive and complicated. It is extremely unlikely that an international treaty can be set up within the project's duration. ERI's advantage over other European forms include: it is designed specifically for research; it contains the option not to follow European and national procurement regulations; it provides tax exemption. Advantages over national forms also include tax exemption, its truly trans-national nature and limited liability. These advantages are not surprising, given that ERI was designed after an examination of the various weaknesses of the available European and national options:

“Recent work carried out under the auspices of ESFRI has recognised that existing legal forms under national law (e.g. the French société civile, the German Gesellschaft mit beschränkter Haftung (GmbH), the UK limited liability company (Ltd) or the Dutch stichting (foundation)) do not fulfill the needs of these new research infrastructures. The analysis is similar for existing legal forms under international or Community law (e.g. international/intergovernmental organisations, European Economic Interest Groupings)” ([5] Explanatory memorandum page 3).

If ERI is not available in time for the PRACE RI, a national legal form will have to be used. Different national forms from the principal partners (PP) countries as well as Belgium are described and rated above. Since a real difference between the national forms has not been fully qualified yet, the selection of the future host country will also determine which national legal form the PRACE RI should adopt.

What follows is an analysis of the different legal forms which have been selected according to each of the criteria upon which they have been marked. The forms have not yet been given points on some criteria pending further analysis by specialist lawyers.<sup>5</sup>

## 1. Time to Implement

### **International Form**

The international form takes very long to implement since it depends on extensive inter-state negotiation. This is its primary disadvantage.

### **Currently available European Forms**

A contract to establish an EEIG must be filed at the registry designated by each Member State. Registration in this manner confers full legal capacity on the EEIG throughout the Community – it is quick to implement. The SE can also be fairly quickly established. The registration of an SE must be disclosed for information purposes in the Official Journal of the European Communities. Every SE must be registered in the State where it has its registered office, in a register designated by the law of that State. Setting up an EGTC needs authorisation from the member state where it will be based, which in principle takes a maximum of three months.

European Joint Undertaking can take a long time to negotiate with the Partners and EU as some recent examples demonstrated (e.g. GALILEO).

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<sup>5</sup> As legal personality is a necessary feature and is provided by all of the legal forms listed in the table below, the legal personality is not discussed in this analysis.

**ERI**

Compared with the international form, an ERI would be comparatively quick to implement. “An ERI shall be set up by a decision of the Commission acting on the basis of implementing powers conferred by the Council (Article 202 EC Treaty). The Commission shall act upon an application submitted by those who wish to become founding members of the ERI. The decision setting up the ERI shall be taken following the advisory procedure. It would also allow a quicker process than if individual decisions were taken by the Council” ([5] Explanatory Memorandum, page 6).

**National Forms**

National legal forms are in principle also very quick to implement.

**2. Non Profit Objective****International Form**

The international form, as it is made to measure, can be non-profit.

**Currently available European Forms**

An EEIG is itself non-profit, but its members are profit making organisations. An SE is profit sharing. An EGTC is non-profit as “the tasks of an EGTC shall be limited primarily to the implementation of territorial cooperation programmes or projects co-financed by the Community through the European Regional Development Fund, the European Social Fund and/or the Cohesion Fund.” European Joint Undertakings always have a non-profit objective.

**ERI**

According to the ERI proposal for a Council Regulation, “An ERI shall pursue its task on a non-economic basis. However, it may carry out limited economic activities closely related to its task provided that they do not jeopardise the achievement of that task.” This would suit the aims of PRACE well as provision is also made for cooperation with industry “The ERI shall record 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.” (Articles 2.2 and 2.3, [5] p.14).

**National Forms**

Limited liability Company (GmbH) and Private limited Company are primarily designed for profit sharing but can be non-profit. The following are non-profit: Fundación ES, Société Civile FR, Belgian International Association BE, Association FR, Stichting NL, Sociedad Civil ES, German Association DE.

**3. European Character****International Form**

An international organisation would certainly have a supra-national character, which is the most important aspect, and logically have a European character if all or most of its members were European.

**ERI**

An ERI will be governed by Community law, by the law of the State where the ERI has its statutory seat in the case of matters not regulated by Community law and by its Statutes,

adopted in conformity with the applicable law. The Court of Justice of the European Communities shall have jurisdiction over litigation among the members, between the members and the ERI and over any litigation where the Community is a party.

### **Currently available European Forms and National Forms**

Obviously all of the currently available European forms have a European character and none of the national forms.

## **4. Limited Liability**

### **International Form**

The international form can be designed to have limited liability.

### **Currently available European Forms**

EEIG and EGTC do not have limited liability. Whereas an SE is a European public limited-liability company and the European Joint Undertaking has limited liability.

### **ERI**

The financial liability of the members for the debts of the ERI will be limited to their respective contributions provided to the ERI. The members may specify in the Statutes that they will assume a fixed liability above their respective contributions or unlimited liability.

### **National Forms:**

The German Limited liability Company (GmbH) and British Private limited Company obviously have limited liability. As do German Associations and Dutch Stichting. Belgian and French Associations, French Société Civile, and Spanish Sociedad Civil and Fundación all have unlimited liability.

## **5. Suitable Governance**

### **International Form**

Once again, as the international form is made to measure, governance can be customized to fit (depending on agreements between the partners). Voting rights can be linked to the financial contribution.

### **Currently available European Forms**

All of the currently available European forms which were examined have governance structures which could be adapted to the needs of PRACE. The EEIG must have at least two governing bodies: the members acting collectively and the manager or managers. The managers represent and bind the EEIG in its dealings with third parties. The Statutes of the SE must provide as governing bodies the general meeting of shareholders and either a management board and a supervisory board (two-tier system) or an administrative board (single-tier system). An EGTC has at least the following governing bodies: (a) an assembly, which is made up of representatives of its members; (b) a director, who represents the EGTC and acts on its behalf, and the statutes may provide for additional governance with clearly defined powers. For European Joint Undertakings the governing bodies of the joint undertaking are the Administrative Board, the Executive Committee and the Director. The

question of voting rights related to financial contribution will be further explored in later work.

### **ERI**

The governance structure of an ERI is very loosely defined, leaving a great deal of freedom to implement the model that best suits each case. The ERI proposal states: “*Organisation of the ERI*: The Statutes shall provide for at least the following bodies having the following competencies: (a) an assembly of members as the body having full decision-making competency, including the adoption of the budget; (b) a director or a board of directors, appointed by the assembly of members, as the executive body and legal representative of the ERI. The Statutes shall specify the manner in which the members of the board of directors legally represent the ERI.” ([5] Article 12)

### **National Forms**

All the national forms have clear management, governance and accountability which could be adapted to the PRACE organisation. In general, companies have stricter and more detailed governance requirements whereas foundations and associations have usually more freedom. Associations are normally more democratic than companies. The question of voting rights related to financial contribution will be further explored by lawyers in due course.

## **5. Ownership and Share Transfer**

### **International Form**

Under an international treaty this can be specified in the statutes as long as the parties are in agreement, however, given past examples, this issue should be carefully considered in the preparatory phase.

### **Currently available European Forms**

For the Currently Available European Forms the contribution can be changed following a decision by the general assembly.

### **ERI**

Again, the ERI form leaves a great deal of freedom regarding the transfer of shares, stating only the following “An ERI must at all times have at least three Member States as members. Further Member States may join as members at any time on fair and reasonable terms specified in the Statutes. Member States shall jointly hold the majority of the voting rights in the assembly of members. ([5] Article 8.2 and 8.3)”

### **National Forms:**

Shares can be bought and sold without changing the statutes in the case of companies.

## **6. Compatible with Funding Model**

### **International Form**

Under an international treaty this can be specified in the statutes as long as the parties are in agreement.

### **Currently available European Forms**

This is pending investigation by legal experts.

Community funding to an ERI may be awarded solely in accordance with Title VI of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities. Funding under Cohesion Policy shall also be possible, in conformity with the relevant Community legislation.

### **National Forms**

This is pending investigation by legal experts.

## **7. Flexible for Usage**

### **International Form**

The international form can be designed to accommodate both the Cycles and Operator usage model.

### **Currently available European Forms**

As an EEIG's purpose is "to facilitate or develop the economic activities of its members and to improve or increase the results of those activities" this form fits neither the Cycles or Operator model. An SE is designed to facilitate cross-border mergers and not research. An EGTC has the "exclusive aim of strengthening economic and social cohesion". The European Joint Undertaking would be able to accommodate both PRACE models.

### **ERI**

Regarding usage, PRACE would be free to define its own access and usage policy and "they should be effectively open to the European research community at large and have the ambition to enhance the European scientific capabilities beyond the current state of the art and thereby contribute to the development of the European Research Area." ([5] page 11, point 10)

### **National Forms**

According to the selected Funding und Usage Model, a Company would fit better to the Operator Model whereas an Association would fit better to the Cycles Model. If we consider that the PRACE Usage and Funding Model will develop over time towards the Operator Model a company form would be more appropriate.

## **8. Tax Exemption**

### **International Form**

The international form is exempt from tax if the signatories agree.

### **Currently available European Forms**

The EEIG and SE are not exempt from taxes. Whereas the EGTC is exempt from taxes. The European Joint Undertaking is exempt from VAT but not automatically exempt from other taxes – the situation depends on an agreement with the host state.

### **ERI**



The ERI is an international body within the meaning of Article 151(1)(b) of Directive 2006/112/EC<sup>6</sup>, and an international organisation within the meaning of the second indent of Article 23(1) of Directive 92/12/EEC<sup>7</sup>. This means that under ERI, PRACE will have tax exemption.

#### **National Forms:**

Private Limited Companies are exempt from tax if they are non profit. French Société Civile and Spanish Fundación are always exempt from tax. Spanish Sociedad Civil, German Limited Liability Companies (GmbH) and Dutch Stichting are exempt from tax if they are declared in the public interest. French Associations, German Associations and Belgian Associations are exempt from tax if non-profit.

## **9. Flexible Procurement**

### **International Form**

The international form is usually not subject to national or European procurement rules, depending on the agreement of its members.

### **Currently available European Forms**

EEIG, SE and EGTCs are all subject to national or European procurement rules. European Joint Undertakings are not subject to national or European procurement rules.

### **ERI**

The ERI is an international body within the meaning of Article 15, point (c), of Directive 2004/18/EC<sup>8</sup>. Under the ERI, PRACE will not have to follow EU procurement law. As previously mentioned, this does not affect the fact that PRACE should always ensure that it follows appropriate rules in all procurements in order to get the best value.

### **National Forms**

Of the national legal forms examined all are subject to national and European procurement laws.

## **10. Cost to Set up**

### **International Form**

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<sup>6</sup> (on the common system of value added tax), *Exemptions relating to certain Transactions treated as exports*. the supply of goods or services to international bodies recognised as such by the public authorities of the host Member State, and to members of such bodies, within the limits and under the conditions laid down by the international conventions establishing the bodies or by headquarters agreements;

<sup>7</sup> Products subject to excise duty shall be exempted from payment of excise duty where they are intended: - for international organizations recognized as such by the public authorities of the host Member State, and by members of such organizations, within the limits and under the conditions laid down by the international conventions establishing such organizations or by headquarters agreements,

<sup>8</sup> DIRECTIVE 2004/18/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts Article 15 Contracts awarded pursuant to international rules. This Directive shall not apply to public contracts governed by different procedural rules and awarded:

(c) pursuant to the particular procedure of an international organisation.

The international form is by far the most expensive due to the lengthy negotiation period and creation of a customized social security system.

### **Currently available European Forms**

The currently available European forms (EEIG, SE, EGTC) are comparatively cheap to set up, apart from the European Joint Undertaking, which can take a long time to negotiate with the Partners and EC.

### **ERI and National Forms**

The ERI would not be expensive and the national legal forms examined are also comparatively cheap to set up. As all can rely on national social security systems.

## **11. Personnel**

### **International Form**

The international form usually includes special privileges for personnel, regardless of the country that they work in.

### **Currently available European Forms**

Of the Currently Available European Forms this is pending investigation by legal experts.

### **National Forms**

The national legal forms examined must follow the employment laws of the host countries.

## **12. Staff Privileges**

Only the international form and the European Joint Undertaking allow staff privileges. The salaries, privileges, and immunities for staff (are) not considered justified for most ERIs [16]

## **13. Designed for Research**

### **International Form**

The international form is designed from scratch so can accommodate any objective, including research.

### **Currently available European Forms**

Of the currently available European forms, the EEIG's purpose is "to facilitate or develop the economic activities of its members and to improve or increase the results of those activities". It is not designed for research. The SE was designed to facilitate cross-border mergers, not to do research. The EGTC has the "exclusive aim of strengthening economic and social cohesion" which could include research at a stretch but it is certainly not designed for research. The European Joint Undertaking is designed for research with examples including the Joint Technology Initiatives, Galileo and Fusion for Energy.

### **ERI**

The legal framework for an ERI is designed to facilitate the joint establishment and operation of research facilities of European interest between several Member States and countries

associated to the Community R&D Framework Programme. It was developed in response to requests from the Member States and the scientific community, because the available national and international legal forms are not fully adequate.

**National Forms**

Of the national legal forms examined, none are specially designed for research.

## 6 Annex

The following tables show the different national legal entities suited for PRACE RI. Many of them are already used for European RIs. The tables allow the different forms from Belgium, France, Germany, Netherlands, Spain, and the UK to be compared.

### 6.1 Annex Legal forms: Companies

Companies			
Country	France	Germany	UK
<b>Name of legal entity</b>	Société Civile (firm for non-commercial purpose)	Limited liability company (German: Gesellschaft mit beschränkter Haftung (GmbH))	Private company limited by shares
<b>Legislation and law applicable</b>	The Société Civile shall be governed by the provisions of Articles 1832 to 1844-17 and 1845 to 1873 (Titre IX du Livre III du Code Civil).	GmbHG (Limited liability company law) HGB (German Commercial Code)	English law. Governed by the Companies Act 1985 and 1989.
<b>Short description</b>	The Societe Civile has a non-commercial character all firms to which legislations does not attribute another character by reason of their form, nature or objects. The partnership is civil if its activities are covering the civil domain and if it's not receive a commercial	The German limited liability Company constitutes a legal entity. It may be established for every acceptable purpose. Its liability is limited, only the assets of the Company itself can be held liable. Mandatory bodies are the general assembly of shareholders and the management	Shareholders have limited liability and shares for private companies <b>may not</b> be offered to the general public.  Liability limited to capital originally invested i.e. nominal value of the shares in the company.

## D2.1.1

## Report on options for a legal entity

<b>Companies</b>			
<b>Country</b>	<b>France</b>	<b>Germany</b>	<b>UK</b>
	character by the French Law.	directors.	
<b>Legal person</b>	Yes	Yes	Yes
<b>Non profit</b>	Yes	possible	Yes (although most private companies limited by shares are for profit it is possible to run them on a not for profit basis)
<b>Aims of legal entity/ objectives</b>	Any objective non commercial profit which might be legal. In France, every firm must have lawful objects and be formed in the common interest of the members	Any objective which might be acceptable, not illegal.	For every company these are described in the Memorandum of Association (includes info on the company name, location and what it will do) and the Articles of Association (includes how company will be run, rights of shareholders etc.)
<b>Foundation / Set up of the legal entity (requirements for founding the legal entity)</b>	<p>Individuals and/or legal entities</p> <p>Required: Registration in the commercial register.</p> <p>Conditions :</p> <p>A firm is established by two or several persons by a contract.</p> <p>The memorandum and the articles of association or of partnership must be drawn up in writing.</p> <p>Four requisites are essential for the</p>	<p>Possible members: Individuals or legal entities</p> <p>Required: Registration in the commercial register. Condition to the registration is that</p> <p style="padding-left: 40px;">at least one managing director has been appointed;</p> <p style="padding-left: 40px;">at least 25 % of the share capital has been paid.</p> <p>The legal entity is implemented by the registration in the commercial register.</p>	Must be registered with the Registrar of Companies at Companies House.

Companies			
Country	France	Germany	UK
	<p>validity of the contract :</p> <ul style="list-style-type: none"> <li>• The consent of the party who binds itself;</li> <li>• its capacity to contract;</li> <li>• A definite object which forms the subject-matter of the undertaking;</li> <li>• A lawful cause in the obligation.</li> </ul> <p>No minimum capital in the firm.</p>	<p>It is formed by means of the articles of association, which must be authenticated by a notary. The GmbH law outlines the minimum content of the articles of the company, but it is quite common to have a wide range of additional rules in the articles.</p> <p>A GmbH is formed in three stages:</p> <ol style="list-style-type: none"> <li>1. the "<b>pre founding association</b>", which is regarded as a <b>private partnership with full liability</b> of the founding partners/members;</li> <li>2. the "<b>pre association/company prior to registration</b>", an already established but not yet registered company, often qualified with "<b>i.G.</b>", meaning "in Gründung" (in the course of incorporation);</li> <li>3. and the <b>fully registered GmbH</b>. Only the registration of the company in the commercial register provides the GmbH with its full legal status.</li> </ol>	
<b>Commitments envisaged (accounting / balanced sheet)</b>	Annual accounts need to be audited by a registered auditor and registered in the commercial register each year	accounting → GmbH is a merchant	Annual accounts need to be audited by a registered auditor and deposited at companies house each year by a filing date
<b>Formation / Bodies of the legal entity</b>	There's only one obligation in the governance of a Société Civile. The	At least one person is required for the	Formed on completion of four forms and cheque for £20 sent to companies'

Companies			
Country	France	Germany	UK
<b>Proportions / Majority</b>	<p>French law imposes the constitution of a General meeting of shareholders to ensure their rights in the partnership.</p> <p>Otherwise, the governance organization is only described by the Articles and not by the Law. The shareholders draft in the Articles the organization governance that they want. Shareholders could create different committees as:</p> <p>Scientific and strategic committee,</p> <p>Users committee,</p> <p>Technical committee,</p> <p>Financial committee,</p>	<p>establishment.</p> <p><b>Bodies: At least</b> one managing director and the general assembly of shareholders are required as company bodies; managing directors represent the company amongst third parties, § 35 Abs. 1 GmbHG, the assembly of shareholders has a steering and supervisory function.</p> <p>The <b>articles can</b> define additional company bodies, for example the supervisory board (Aufsichtsrat, required if the company has more than 500 employees), the board of trustees or the advisory board.</p> <p>A violation of its duties by a managing director will not affect the validity of a contract with a third party, but the GmbH may hold the managing director in question liable for damages. Minimum one shareholder, bylaws, registration in Commercial Registry, Notary</p> <p>A number of business transactions have to be notarized, such as transfer of shares, issuing of stock, and amendments to the articles of association. Many of those measures have to be filed with the company registry where they are checked by special judges or other judicial officers. In most cases the desired measures are only legally valid when entered into the</p>	<p>house in the UK. Takes about 10 days. Need to identify a registered address, a company secretary and at least one director.</p>

<b>Companies</b>			
<b>Country</b>	<b>France</b>	<b>Germany</b>	<b>UK</b>
		<p>registry.</p> <p>new: possible on the internet (central platform for the storage of legally relevant company information, Publication applications for the company register can be submitted via the service platform).</p>	
<b>Financing / seed capital</b>	<p>There is no legal minimum for the share capital. For example, GENCI has 10€ share capital. The shareholders contribution could appear in:</p> <p>Cash contribution,</p> <p>Contribution in the form of skill,</p> <p>Contribution in kind.</p>	<p>Minimum registered capital € 25,000.</p> <p>Under German law, the GmbH must have a minimum founding capital of € 25,000, of which 25% but at least € 12,500 has to be contributed by its members. Can differ in other European Countries.</p>	<p>Financing required is the face value of the shares – so can be very modest.</p>
<b>Partnership</b>	<p>a Individual and/or public or private firm</p>	<p>Public, private, large number of European countries, large flexibility for newcomers to join as contracting party</p>	<p>Public, Private, large number for European countries, large flexibility for newcomers to join.</p>
<b>Liability</b>	<p>With regard to third parties, partners are liable indefinitely for debts of the partnership in proportion to their share in the capital of the partnership on the date</p>	<p>As the name already says, the members of the limited liability company are not liable with their personal assets. The liability is limited to the capital of the company. But:</p>	<p>Limited liability for shareholders.</p>



<b>Companies</b>			
<b>Country</b>	<b>France</b>	<b>Germany</b>	<b>UK</b>
	when falling due or on the day of cessation of payments Partners are personally and indefinitely liability, but without joint and several liability, for payment of debt in the limit of their participation in the nominal capital. Thus, there is no joint and several liabilities of shareholders.	The managing directors are jointly liable towards the shareholders for errors committed in the course of their management.	
<b>Tax Issues / Taxation</b>	Concerning, the Tax system, the taxation in a Société Civile is very attractive because there is no company tax, no corporate tax and no local authority taxes.  The Société Civile has also the faculty to choose the value-added tax (VAT). This choice permits to buy computer equipments without VAT, thus less expensive.	Corporate income tax in Germany.	Will be liable for UK Tax – if not for profit this will be mainly VAT
<b>Commitments</b>	A company is a legal entity and can enter into commitments/ contracts etc		A company is a legal entity and can enter into commitments/ contracts etc
<b>Intellectual Property Rights</b>	No rule. The firm can own IPR	Background: The founders may agree about granting access rights/ licences to preexisting know-how necessary for the Limited Company to act independently and to perform its activities.	A company can own IPR.

<b>Companies</b>			
<b>Country</b>	<b>France</b>	<b>Germany</b>	<b>UK</b>
		Foreground: As the GmbH has a legal personality it can become owner of the knowledge generated if so agreed upon in the statute. Commercial exploitation is possible.	
<b>Development of legal regulation</b>	No minimum legal for constitution capital	Registered capital € 25.000 could change to € 10,000. Law will be reformed which means legal uncertainty. If this issue is changed than financial advantage.	Founding shares normally have a nominal value (usually £1).
<b>Acceptance in countries</b>	Recognised internationally	Jurisdiction of the European Court of Justice: All kinds of company law have to be recognized as legal entities throughout the EC.	Recognised internationally
<b>Advantages</b>	No minimum capital. It's a flexibility governance structure.	Liability is limited to the assets of the company  Can be founded in every European country so the acceptance is very high  The national regulation about the company with limited liability does not differ too much so the partners can understand foreign regulation very quickly.	Liability to shareholders is limited to the value of the shares.  Easy to set up.  Accounting rules and budget discipline clearly defined.  Flexibility to expand share capital and accommodated new partners  Avoids high cost of intergovernmental agreements
<b>Disadvantages</b>	Partners are personally and indefinitely liability, but without joint and several liability, for payment of debt in the limit	At the moment at least € 25,000 are required as startup capital for a German Company with limited liability.	Needs to comply with standard UK taxation law applicable to all companies

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<b>Companies</b>			
<b>Country</b>	<b>France</b>	<b>Germany</b>	<b>UK</b>
	of their participation in the nominal capital	Can differ in other countries.	

## 6.2 Annex Legal forms: Foundations

<b>Foundations</b>		
<b>Country</b>	<b>The Netherlands</b>	<b>Spain</b>
<b>Name of legal entity</b>	Stichting	Foundation
<b>Legislation and law applicable</b>	Dutch law; burgerlijk wetboek	Foundation Law
<b>Short description</b>	Legal entity with limited liability No shareholders or membership; only a board Non-profit	Foundations have a legal personality which is always non-profit, for the public good and which undertake activities in social, cultural or scientific fields.
<b>Legal person</b>	yes	Yes
<b>Non profit</b>	yes	Yes
<b>Aims of legal entity/ objectives</b>	Can be undertaking (obligatory registration) Non-profit aim Governance by an board; the first members of the board are appointed by the articles of the stichting Board is controlled by public procecutor (openbaar ministerie), in case of doubt about good governance or breach of the articles	Foundations can also develop actions which contribute to the public good. They may also engage in economic activity as long as this does not exceed 40% of their income.
<b>Foundation / Set up of the legal entity (requirements for founding the legal entity)</b>	Notarized founding act and articles. Dutch Law outlines minimum content of the articles. Public registration at Chamber of Commerce in	- Individuals or legal entities -Constitution must take place in the presence of a notary (who must certify the founding act and the

<b>Foundations</b>		
<b>Country</b>	<b>The Netherlands</b>	<b>Spain</b>
	<p>register (is not necessary for the legal status but for the liability. As long as it is not registered the boardmembers are individually and fully liable)</p> <p>Public registration at Chamber of Commerce in Handelsregister if the stichting holds an undertaking</p>	<p>articles of the foundation)</p> <p>-The foundation must be registered in the register of foundations</p>
<b>Commitments envisaged (accounting / balanced sheet)</b>	<p>Normal accounting</p> <p>Publication of annual accounts differs and is dependant on the size of the undertaking</p> <p>If holding an undertaking the stichting has the obligation to publish an annual netto-turnover.</p>	<p>-Accounting</p> <p>-Annual register of accounts</p>
<b>Formation / Bodies of the legal entity Proportions / Majority</b>	<p>Board, the first members are to be appointed by articles</p> <p>Flexibel construction for decisionmaking or design of the internal organisation (think of representation).</p>	<ul style="list-style-type: none"> <li>- Board of members of the foundation</li> <li>- Board. There must be a representative of each member of the foundation - decisions are taken by majority.</li> <li>- The board may delegate power of attorney to one of its members with</li> </ul>
<b>Financing / seed capital</b>	<p>No minimum aquired</p>	<p>-There is no minimum, but sufficient capital in order to act.</p> <p>- If the foundation is dissolved, the remaining capital must be given to other non profit entities or to the state.</p>
<b>Partnership</b>	<p>Flexibility, open for all public or private parties</p>	<p>Public, private and without limit on number. The entry of a new member is very easy.</p>

<b>Foundations</b>		
<b>Country</b>	<b>The Netherlands</b>	<b>Spain</b>
<b>Liability</b>	<p>Limited liability</p> <p>Board members are only liable in case of negligence of reckless behaviour to reasonable standards</p>	<p>Unlimited responsibility of the members. In any case, not acting in the market it is not reasonable to suppose that they will take on responsibilities apart from penal and personal which are always unlimited anyway.</p>
<b>Tax Issues / Taxation</b>	<p>Vennootschapsbelasting</p> <p>VAT</p>	<p>Very favorable fiscal status, does not pay company taxes, except on the economic activity realized and even then only at a rate of 10%. Those who give money to the foundation also receive tax exemptions. There are various exemptions which apply to the persons who participate in the foundation.</p>
<b>Commitments</b>		
<b>Intellectual Property Rights</b>	<p>Stichting is a legal entity and can be owner of IPR in all forms;</p>	<p>The foundation may hold intellectual property, both ceded by its members and created through its own activity. It may economically exploit said intellectual property.</p>
<b>Development of legal regulation</b>	<p>No change of legal regulation expected for the stichting.</p> <p>International regulation of ERI (European research institute). It is preferred to apply for a ERI status (EC-approval) because it will simplify international</p>	<p>Regulation for foundations is stable and similar to that of the rest of the EU countries.</p>

<b>Foundations</b>		
<b>Country</b>	<b>The Netherlands</b>	<b>Spain</b>
	<p>cooperation and has tax advantages.</p> <p>The opportunity to apply for a future ERI status should be arranged for in PRACES chosen legal entity or PRACE should anticipate its legal form on ERI.</p> <p>The Ministry of Education is in favour of an application for an ERI of the EC.</p>	
<b>Acceptance in countries</b>	Stichting is recognized as a legal entity in other countries	Recognized by all of the EU countries.
<b>Advantages</b>	It is a flexible structure;	Tax benefits, access to advantages and subsidies. Possible to engage in economic activity with low company tax.
<b>Disadvantages</b>	<p>Because there is only a board and no shareholders it can be necessary to install a supervisory board or another provision.</p> <p>Change of the articles can only by a notarized act.</p>	Management costs must be less than 20% of income, the rest must be used for scientific purposes.

## 6.3 Annex Legal forms: Associations

Associations					
Country	Belgium	Belgium	France	Germany	Spain
<b>Name of legal entity</b>	Association sans but lucratif (A.S.B.L.) (= non-profit organization)	Association internationale sans but lucratif (A.I.S.B.L.) (= non profit organization)	Association	Registered association (German: Eingetragener Verein (e.V.))	Association (Sociedad civil)
<b>Legislation and law applicable</b>	Law 27th June of 1921 changed by the Law 2nd May of 2002 (L 2002-05-02/51, art. 1, 008).	Law 27th June of 1921 changed by the Law 2nd May of 2002 (L 2002-05-02/51, art. 1, 008).	Law 1th July of 1901.	BGB (German Civil Code) VereinsG (Law relating to associations)	Association Law
<b>Short description</b>	Have non-profit character all partnerships which don't have industrial or commercial activities and have non profit sharing. It's similar as the French association. The A.S.B.L is e legal entity. The partnership obtains it juridical person when it's registered to the Belgian organism.	It's similar as the ASBL.	The article 1er of the Law provides that: "the association is a contract between 2 or several persons which agree to put in together their knowledge and activities in the other way that the profit sharing".	A registered association consists of a group of people, who joined to implement a common purpose. Mandatory bodies are the general assembly of members and the board of directors. Its continuance is independent of the change of the members.	Associations have a legal personality which is always non-profit, for the public good and which undertake activities in social, cultural or scientific fields.
<b>Legal person</b>	Yes, juridical person when it's registered to the Belgian organism.	Yes, juridical person when it's registered to the Belgian organism.	Yes, if Registration by the French authorities	Yes	Yes
<b>Non profit</b>	Yes	Yes	Yes	possible	Yes
<b>Aims of legal entity/</b>	Any objective non	Any objective non	Any objective non	Any objective which might be	They may also engage



Associations					
Country	Belgium	Belgium	France	Germany	Spain
<b>objectives</b>	commercial profit which might be legal.	commercial profit which might be legal.	commercial profit which might be legal.	acceptable, not illegal.	in economic activity if it is compatible with their non-profit aim.
<b>Foundation / Set up of the legal entity (requirements for founding the legal entity)</b>	<p>Articles: The Articles of the ASBL must be indicated the: Legal Form and social denomination, Name of the ASBL, The purposes of the ASBL, Name of shareholders, Rules of General meeting of shareholders, Financial contributions.</p> <p>The Articles are registered by a solicitor</p>	<p>The Articles of the A.I.S.B.L must be indicated the: Legal Form and social denomination, Name of the A.I.S.B.L, The purposes of the A.I.S.B.L, Name of shareholders, Rules of General meeting of shareholders, Financial contributions.</p> <p>The Articles are registered by a solicitor.</p>	<p>Individuals and/or legal entities</p> <p>Required : Registration by the French authorities</p> <p>Conditions :</p> <p>Established by two or several persons by a contract</p> <p>The memorandum and the articles of association must be drawn up in writing.</p> <p>Four requisites are essential for the validity of the contract:</p> <ul style="list-style-type: none"> <li>• The consent of the party who binds himself;</li> <li>• His capacity to contract;</li> <li>• A definite object which forms the</li> </ul>	<p>- Required: Registration in the register of associations. Condition to the registration is</p> <ul style="list-style-type: none"> <li>• that there are at least seven members and</li> <li>• that the association has its articles (§ 25 BGB). The articles must provide a general assembly of members and a board of directors.</li> </ul> <p>- The association can lose its legal capacity if the number of members falls under three or when a decision of the association is not taken in the interest of common property.</p> <p>An association is formed in two stages:</p> <ol style="list-style-type: none"> <li>1. the "<b>pre association</b>", which is regarded as a <b>private</b></li> </ol>	<p>-Personas o personas jurídicas</p> <p>- Constitution may take place either in the presence of a notary or "ante privada"</p> <p>- The association must be registered in the register of associations</p>

Associations					
Country	Belgium	Belgium	France	Germany	Spain
			subject-matter of the undertaking; <ul style="list-style-type: none"> <li>• A lawful cause in the obligation.</li> </ul> No minimum capital in the firm.	<b>partnership/unincorporated association with full liability</b> of the acting person, without legal capacity. This partnership is set up by the fact that a certain intention to be bound is between the partners; 2. and the <b>fully registered association</b> . Only the registration of the association in the register of associations provides the association with its full legal status.	
<b>Commitments envisaged (accounting balanced sheet)</b> /	Accountancy: The accountancy is the same as a commercial firm if the ASBL has: <ul style="list-style-type: none"> <li>• At least five equivalent workers time-full,</li> <li>• more than 250.000 € of receipts net of tax</li> <li>• more than 1.000.000 € to the assessment</li> </ul>	Accountancy: The accountancy is the same as a commercial firm if the ASBL has: <ul style="list-style-type: none"> <li>• At least five equivalent workers time-full,</li> <li>• more than 250.000 € of receipts net of tax</li> <li>• more than 1.000.000 € to the assessment</li> </ul>	- Accounting - Annual register of accounts		- Accounting -Annual register of accounts
<b>Formation / Bodies of</b>	General meeting of	General meeting of	It's a very flexibility	At least seven members are	- Board of

Associations					
Country	Belgium	Belgium	France	Germany	Spain
<p><b>the legal entity</b></p> <p><b>Proportions / Majority</b></p>	<p>shareholders. The General meeting adopts:</p> <ul style="list-style-type: none"> <li>• The modification of the Articles,</li> <li>• The appointment of the directors,</li> <li>• The appointment of the auditors,</li> <li>• The accounts,</li> <li>• The end of the partnership,</li> <li>• Board of directors</li> </ul> <p>The Board of directors manages the ASBL and represents it in all the judicial and extra-judicial documents.</p>	<p>shareholders. The General meeting adopts:</p> <ul style="list-style-type: none"> <li>• The modification of the Articles,</li> <li>• The appointment of the directors,</li> <li>• The appointment of the auditors,</li> <li>• The accounts,</li> <li>• The end of the partnership,</li> <li>• Board of directors</li> </ul> <p>The Board of directors manages the AISBL and represents it in all the judicial and extra-judicial documents.</p>	<p>governance structure.</p> <p>At least two members are required.</p> <p>No obligation.</p>	<p>required to achieve the status of legal personality.</p> <p>§ 26 Abs. 1 &amp; § 32 Abs. 1 BGB:</p> <p>In general the Association has got two bodies:</p> <ol style="list-style-type: none"> <li>1. The General Assembly (Mitgliederversammlung) decides about matters which are of concern for all of the members, such as appointment and control of the Board of Directors and other bodies of the Association, amendment of the statutes, fees, and dissolution of the association.</li> <li>2. The Board of Directors is the statutory representative of the Association; it is responsible for the management.</li> </ol>	<p>members of the association.</p> <p>- Governance organ, which may be delegated in only one person.</p>
<p><b>Financing / seed capital</b></p>	<p>The accountancy is the same as a commercial firm if the ASBL has:</p> <p>At least five equivalent</p>	<p>The accountancy is the same as a commercial firm if the ASBL has:</p> <p>At least five equivalent</p>	<p>There is no obligation to have a capital.</p>	<p>No seed money required</p> <p>Cost will occur regarding:</p> <ul style="list-style-type: none"> <li>- Notary for the notarization</li> </ul>	<p>-There is no minimum, but sufficient capital in order to act.</p>

Associations					
Country	Belgium	Belgium	France	Germany	Spain
	workers time-full, more than 250.000 € of receipts net of tax  more than 1.000.000 € to the assessment	workers time-full, more than 250.000 € of receipts net of tax  more than 1.000.000 € to the assessment		of the signature of the members of the Board of Directors  - Inscription to the Register of Associations  - Maybe costs of a lawyer setting up the bylaws	
<b>Partnership</b>	Individual and/or public or private firm	Individual and/or public or private firm	Individual and/or public or private firm	Private, public bodies	Public, private and without limit on number. The entry of a new member is very easy.
<b>Liability</b>	The association is liable for all damages caused by the board in performing its duties.	The association is liable for all damages caused by the board in performing its duties.	The association is liable for all damages caused by the board in performing its duties.	§ 31 BGB  In general only the Association itself can be held liable to the amount of its assets for damages of third parties if Members of the Association have acted in their function in the Association.  If they act beyond that they can be held liable themselves.  The association is liable for all damages caused by the board of directors in performing its	Unlimited responsibility of the members.

Associations					
Country	Belgium	Belgium	France	Germany	Spain
				<p>duties.</p> <p>Members of the Association are not personally liable for liabilities established by the association through its board of directors; their liability is <b>limited to their contributions</b>. The board of directors carries liability for faulty management.</p>	
<b>Tax Issues / Taxation</b>	Free Tax	Free Tax	<p>Free Tax</p> <p>As the Société Civile, the French Tax Authority allows the Association has commercial activities until 10% of their total activities. Thereby, this commercial activity permits to develop partnerships with industrial users.</p>	A non-profit association benefits of different tax reliefs	Associations pay normal company tax. If they gain the status of acting for the public good, tax rules are the same as for foundations.
<b>Commitments</b>					
<b>Intellectual Property Rights</b>	The firm can own IPR	The firm can own IPR	The firm can own IPR	Background: The founders may agree about granting	The association may hold intellectual

Associations					
Country	Belgium	Belgium	France	Germany	Spain
				<p>access rights/licenses to pre-existing know-how necessary for the Association to act independently and to perform its activities.</p> <p>Foreground: As the Association has a legal personality it can become owner of the knowledge generated if so laid down in the statute.</p>	<p>property, both ceded by its members and created though its own activity. It may economically exploit said intellectual property.</p>
<b>Development of legal regulation</b>	No capital	No capital	No capital		<p>Regulation for sociedades civiles (associations) is stable and similar to that of the rest of the EU countries.</p>
<b>Acceptance in countries</b>	Recognised internationally	Recognised internationally	Recognised internationally	<p>Jurisdiction of the European Court of Justice:</p> <p>All kinds of company law have to be recognized as legal entities throughout the EU. Regarding Associations this is not decided yet, but already done so in practice. The legal form should be the one of the country in which the registered office of the association is</p>	<p>Recognized by all of the EU countries.</p>

Associations					
Country	Belgium	Belgium	France	Germany	Spain
				placed.	
<b>Advantages</b>	It's a very flexibility governance structure.	It's a very flexibility governance structure.	It's a very flexibility governance structure.	<ul style="list-style-type: none"> <li>- Limited Liability.</li> <li>- Establishment is relatively easy, clear proprietary accrual between members and association</li> <li>- the relative flexibility of the structure</li> <li>- and the fact that a capital is not required</li> </ul>	If recognized as for the public good, tax benefits, access to advantages and subsidies. Possible to engage in economic activity with low company tax.
<b>Disadvantages</b>	non-profit organization and non commercial activity	non-profit organization and non commercial activity	non-profit organization and non commercial activity	<p>(Economic acting is limited)</p> <p>(Legal uncertainty because of reformation of law)</p> <p>registration required</p> <p>sometimes difficult to maneuver, because General Assembly of Members has to be powerful to obtain/keep non-profit-status</p>	Recognition as being for the public good is not immediate and takes place only after the second year of activity.

## 6.4 Annex Operation Models for PRACE

PRACE will create a persistent pan-European high performance computing service and infrastructure. This infrastructure will be managed as a single European entity. European scientists and technologists will be provided with world-class leadership supercomputers with capabilities equal to or better than those available in the USA and Japan. The service will comprise three to five superior HPC centres strengthened by regional and national supercomputing centres working in tight collaboration through grid technologies.

The scope of this deliverable considers a range between two possible models for the PRACE organisation which have been discussed within WP2 and at the PRACE principal partners committee. These two extreme and oversimplified models are described in this section: the Cycles and the Operator models.

These models are very condensed by necessity and are only intended to help the project members visualize the manyfold parameters and their interactions, some being quantitative, others of organizational nature which will interact in evaluating any of the options. They have been included in the hope that they will be helpful to the readers and to establish a common language for collaborating on the project

Under the **Cycles Model** the hosting partners would be delegated the responsibility for designing, acquiring and operating the facilities and the supercomputers, taking into consideration the strategic needs of PRACE. The PRACE entity would perform processes for service definition, high level requirement analysis and contracting with the hosting partner.

Under the **Operator Model** the PRACE entity would be responsible for procurement and would own, house and operate the systems from its own budget.

The model used, or combination of models used will depend ultimately on a PRACE principal partners committee/management board decision. One possible situation is that the organisation would begin based on the cycles model and evolve in the general direction of the operator model in a period of 2-5 years.



### General Model

The figure below represents the **General Model** for the funding and usage of PRACE and is compatible with both the Cycles and Operator models. The PRACE organisation may be relatively small, as in the cycles model or a lot larger including operational staff at each site, as in the Operator model.

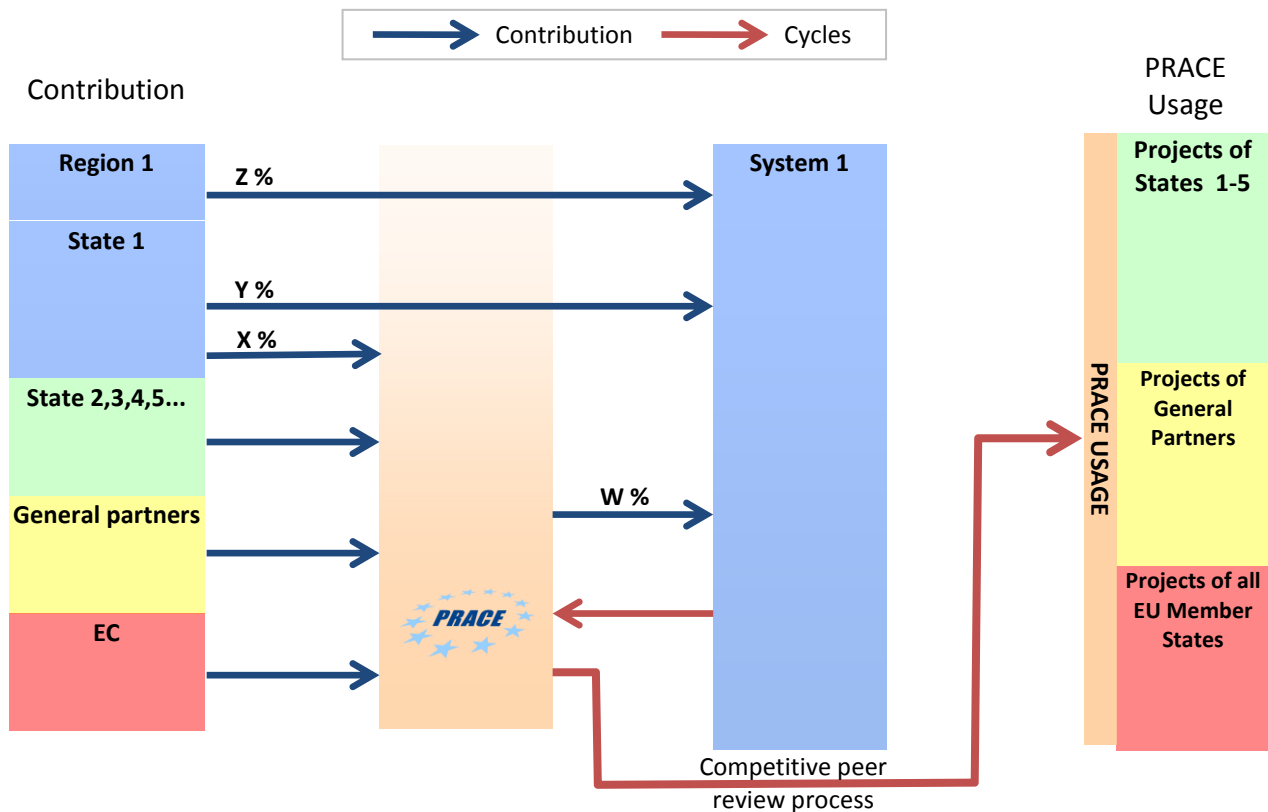


Figure 1: General Model

In both models, the following applies:

- System 1 will be followed by system 2, 3, 4, 5 etc. every x years, hosted by the principal partners on a rotational basis which will in time form a suite of 3-5 systems available at any one time to researchers.
- The contract signed between principal partners, general partners and EC will include clauses to cover obligations and rights of all partners (& EC) plus mechanisms to become or cease to be principal partner or general partner, as well as penalties for principal partners who leave PRACE under certain conditions.
- Within PRACE, there will be a single peer review processes for all proposals, but a) principal partners, b) general partners, c) all EU member states may have a proportion of PRACE computing time allocated to them. The details of this process will be defined within task 2.4 Establishment of the Peer Review Process.
- Contributions will be made by the principal partners, the general partners and the European Commission. Contribution may be in kind if appropriate and agreed. (e.g. software, work force etc.). Other contributions e.g. from industry may also be possible

(not represented in the diagram), and will depend on the funding and usage model adopted.

### Cycles Model

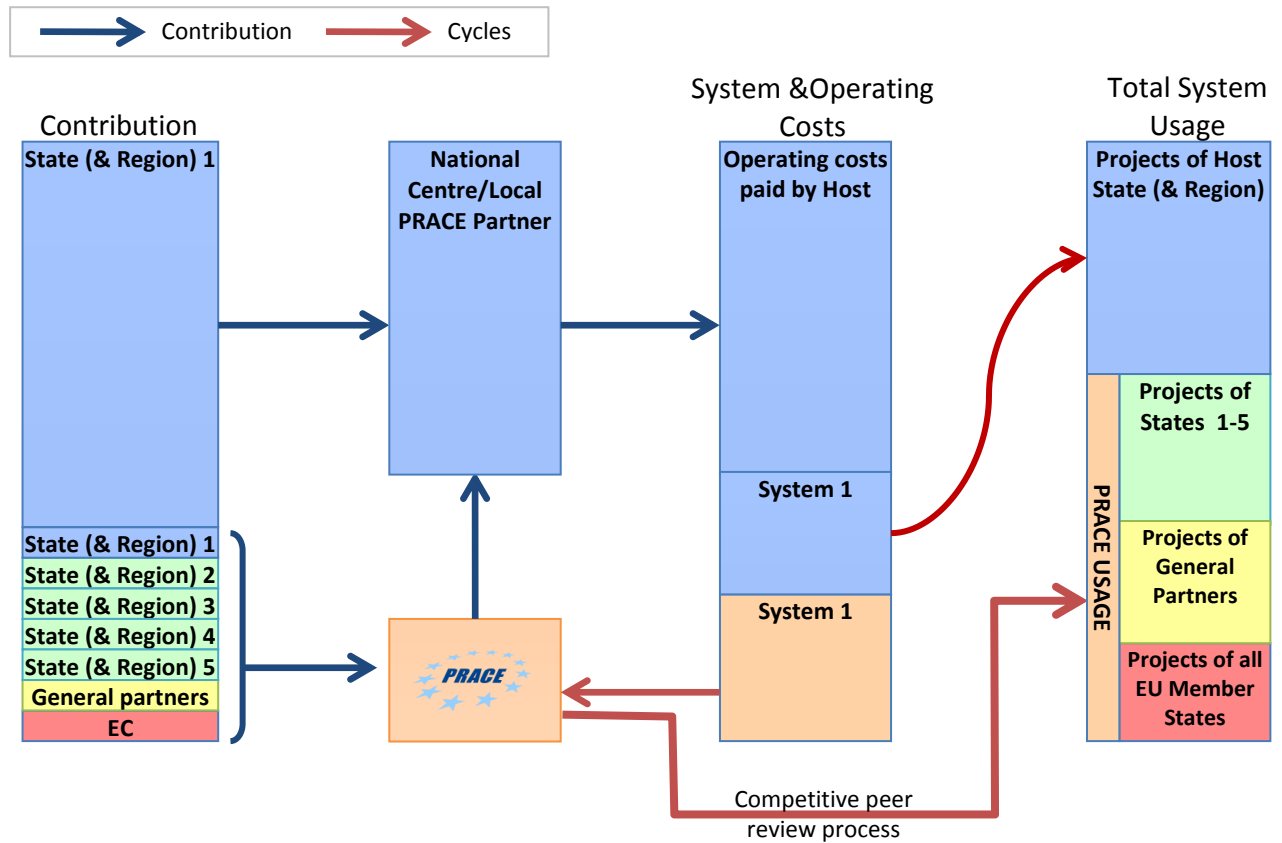
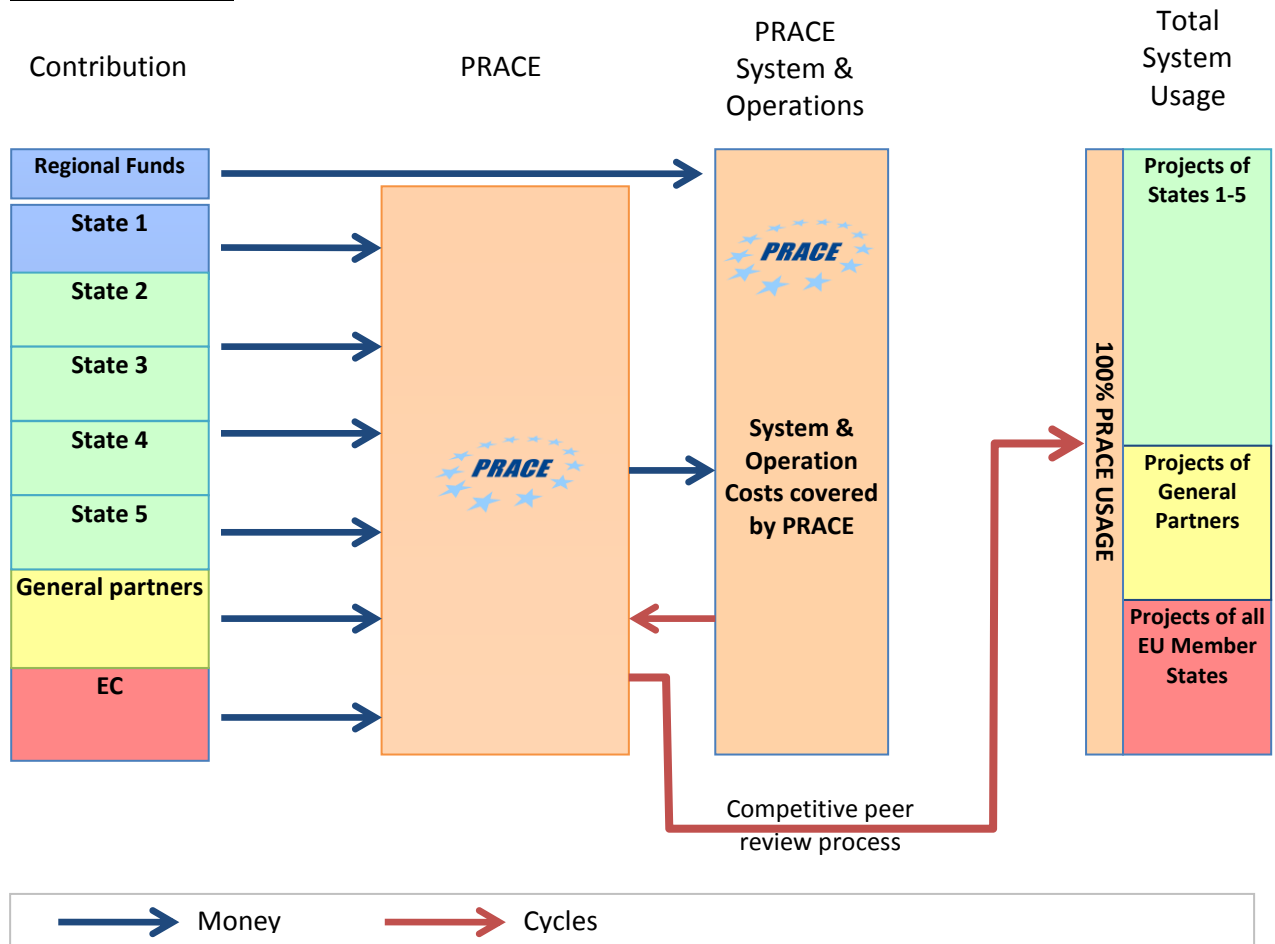


Figure 2: Cycles Model

- Procurement, installation and operation of each system mainly funded by host state (& regional govt. if appropriate) with contribution from EC and general partners.
- Principal partners give cycles to PRACE, not money. A certain percentage of each system's cycles will be kept for the host's national/regional use.
- PRACE will be responsible for:
  - managing the relationship with the host service provider,
  - peer review process for PRACE usage,
  - distributed system management.
  - Meeting user requirements as to which type of architectures are needed for PRACE infrastructure.

**Operator Model***Figure 3: Operator Model*

- PRACE will be responsible for:
  - procurement,
  - installation and operation of each system,
  - peer review process for PRACE usage,
  - distributed system management.
  - Meeting user requirements as to which type of architectures are needed for PRACE infrastructure.
  - Managing the above form yearly contributions from Principal and General Partners and the EC.
- Part of contribution may be in kind if appropriate and agreed.
- Possible regional contribution may be used to top up national contribution for more expensive systems.
- Upgrades of systems would be funded by PRACE.
- If necessary, the distinction between principal and general partners may be replaced by a more suitable distinction better able to take into account the relative contributions of each member state. The usage distribution would then be modified accordingly.