



Analysis of the legal entity models and their suitability for achieving DiSSCo objectives

DiSSCo Prepare WP 7 – Milestone 39

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Abstract

As an aspiring world-class research infrastructure DiSSCo needs to develop within a very well defined and stable organisational framework. During the current preparatory phase, an interim governance model has been put in place, aiming mainly at ensuring a correct alignment and use of synergies amongst all the projects shaping the future of DiSSCo.

As part of these efforts, a dedicated work package (WP7) of the H2020 DiSSCo Prepare project aims at uplifting the organisational aspects to their highest implementation readiness level.

In this context the present milestone explores the various legal entity models that DiSSCo could adopt to secure its sustainability. First the main characteristics of six legal entity models are documented and analysed. From this analysis the most suitable models are short-listed, reducing the choice to three possible candidates: an International Organization, an ERIC or an AISBL. Then a detailed, comparative, analysis is performed.

Based on this study, we make the proposal to consider establishing DiSSCo as an ERIC as the best option, taking into account that adequate mechanisms need to be implemented to allow a prominent role for CETAF.

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Based on this study, we make the proposal to consider establishing DiSSCo as an ERIC as the best option, taking into account that adequate mechanisms need to be implemented to allow a prominent role for CETAF.

Key words

LEGAL, ENTITY, MODEL, GOVERNANCE,
LANDSCAPE, ANALYSIS, ERIC, AISBL.



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01. INTRODUCTION

The work package 7 of the DiSSCo Prepare project contributes to the Organisational Readiness of DiSSCo by producing reference material for the legal framework in which DiSSCo will operate, and for its governance and the common policies that will apply to its operation.

The present Milestone is the discussion document on the possible legal entity model for DiSSCo that will be submitted to the stakeholders through the streams set up by WP8.

In order to elaborate a sound proposal, the partners have been working with a legal advisor who provided analyses based on what appeared to be the most important aspects and criteria. His report is given in Annex.

This report describes the needs for a legal entity, the various relevant models, the criteria used for analyzing them and concludes with recommendations.

02. DiSSCo OBJECTIVES AND THE NEED FOR A LEGAL ENTITY

2.1 Nature and objectives of DiSSCo

During the Preparatory Phase, the research infrastructure will constitute an institutions-based The current DiSSCo Preparatory Phase has been nurtured by the Design study performed under the IceDig project ¹ which already set some of the guidelines towards the transitional governance model with the General Assembly and gave some indications for the future governance :”the research infrastructure will constitute an institution-based General Assembly (GA) that advises and takes decisions on the implementation of the tasks defined through a portfolio of interlinked projects. At that stage, it is necessary the model guarantees the continuity of the community active in running the projects and other activities while stimulating the creation of new national consortia in those countries that have not set up one yet.”

Another key guiding document leading to the definition of the status and governance of the future DiSSCo RI is the Memorandum of Understanding that has been approved by the members which sets the following DiSSCo key high level objectives:

- a. Optimal delivery of all central DiSSCo research infrastructure services;
- b. Achieving the maximum possible inclusion of and balance between member states and associated countries (through participation of national facilities) in the decision-making processes;
- c. Ensuring transparent and fair procedures, with clearly indicated accountable parties, defining and formalizing their mandate;

¹ Icedig, D8.1 Design BluePrint p107

- d. Minimizing the administrative overheads, without compromising the integrity of the governing procedures;
- e. Maintaining adequate flexibility to adapt to future change of needs, including fast expansion of membership or widening of scope, taking into account the different stages of the RI lifecycle;
- f. Setting up well-defined consensus reaching and conflict resolution mechanisms;
- g. Ensure optimal delivery of the DiSSCo services.

2.2 What is a legal entity?

A legal entity is a company or organization that has legal rights and responsibilities, for example the right to make contracts and the responsibility to pay debts.² The term applies to any kind of organization formally constituted according to a. an intergovernmental agreement (International organizations); b. European legislation (EEIG, European company, EGTC, ERIC), or c. a particular set of national laws.

The legal entity is created according to the identity of the members of the Research Infrastructure, the objectives and activities agreed upon by the members as those aiming at and to be implemented commonly through the RI. It thus needs to be both reflecting the goals of the members and the RI they contribute to and provide a legal governance framework that will support on the long term the infrastructure and enable it to develop.

In order to set up our Research Infrastructure as a new entity, we first need to understand the DiSSCo's type and domain of action, where it'll be active, how and with whom it'll work.

2.3 Why a legal entity for DiSSCo?

The most important reason for establishing an RI as a legal entity is to provide an instrument to ensure its sustainability in the long term.

As described in the ICEDIG Blueprint chapter on Governance, among the key aspects to be considered to ensure such a sustainability is the financial support and commitment it can obtain from funders to cover operational budgets but also the start-up and construction costs.

A RI such as DiSSCo “requires investments that do not traditionally lead to strong (tangible) asset value from the accounting point of view. Furthermore, the operation of distributed RIs is predicated on investments made across multiple legal entities that together are contributing towards achieving the DiSSCo vision.”³ This is why the Legal entity model needs to enable the RI to valorise its distributed structure and give it a capacity to access finance.

So far, the activities that have led to DiSSCo have been supported by the institutions and the EU projects they have been managing, notably through the CETAF networking role. In addition to CETAF role as key driver, DiSSCo has benefitted from each institution own active role as the entirety of the participating facilities have secured long-term financial support through governmental statutory

² Definition of **legal entity** from the [Cambridge Business English Dictionary](#) © Cambridge University Press

³ Conceptual design blueprint for the DiSSCo digitization infrastructure DELIVERABLE D8.1

funding and already successfully operate in the context of regional and/or national strategic priorities⁴.

03. Legal entity models

There are many types of Legal entity models enabling the legal formation and administration of the RI to engage in its activities, work, or the provision of its services. The chosen model can vary according to various factors and criteria that have been decided by the members of the RI and notably by the GA.

3.1 Overview

This section gives a synthetic overview of the detailed descriptions of the most relevant legal entity models provided in Section 4 of the Annex.

3.1.1 International/Intergovernmental Organisation

An international organisation is an entity having a structure and powers defined in its constitutive instrument, *i.e.*, a “treaty”. A treaty means an international agreement concluded between states in written form and governed by international law.

A treaty is the only way in which states or governments may create binding legal obligations, distinct from those arising under their national law. The act by which states express their consent to be bound by a treaty is distinct from the treaty’s entry into force. The establishment process of an IO is therefore long and complicated.

3.1.2 European Research Infrastructure Consortium (ERIC)

A European Research Infrastructure Consortium is a legal framework introduced by an EU Council Regulation in response to the need for a legal framework for EU-wide entities, in particular, distributed research infrastructures. The objective of the ERIC Regulation is to facilitate the establishment and operation of European research infrastructures involving several Member States.

Since the adoption of the ERIC Regulation in 2009, 21 ERICs have been established and have their statutory seat in 9 Member States and in one associated country (Norway). Together they currently have more than 20 Member States and associated countries as members and observers.

3.1.3 European Economic Interest Grouping (“EEIG”)

A European Economic Interest Grouping is a legal entity created under an EU Council Regulation. It must have members based in at least two countries within the EU or the European Economic Area (EEA) and be non-profit making.

⁴ Distributed System of Scientific Collections (DiSSCo) European Memorandum of Understanding

The purpose of the EEIG is to facilitate and/or develop the activities of its members by a pooling of resources, activities or skills. This is intended to produce better and more efficient results compared to the members acting alone. Its activities must be related and must not be more than ancillary to the activities of its members.

The EEIG is designed to minimise the “legal, fiscal and psychological difficulties” that natural persons, companies, firms and other bodies face in cooperating across borders within the EU, for instance to form consortia to take part in EU programmes.

3.1.4 European Grouping of Territorial Cooperation (EGTC)

The objective of a European Grouping of Territorial Cooperation must be to facilitate and promote “territorial cooperation”, with the exclusive aim of strengthening the Union economic, social and territorial cohesion. The EGTC should act, either for the purpose of implementing territorial cooperation programmes or projects co-financed under the Structural Funds or for the purpose of carrying out actions of territorial cooperation which are at the sole initiative of the Member States and their regional and local authorities with or without a financial contribution from the EU Commission. There are around 40 existing EGTCs but there seem to be no known research infrastructures incorporated as EGTC.

3.1.5 “Association internationale sans but lucratif” (AISBL)

The AISBL is a legal entity used for an international, not-for-profit associations based on Belgian law. It is regulated by the Belgian “Code on Companies and Associations” of 23 March 2019.

3.1.6 “Stichting”

A Stichting is a foundation established under Dutch law. The Stichting does not have members or shareholders and is considered to be an “orphan entity” (no one “owns” a Stichting). The only requirement is to have a board of directors, which has full control and is the only mandatory governing body. There are more than 200,000 existing entities set up in the form of a Stichting, not only for charitable purposes, but also many of them are used for economic, social and business purposes, including as anti-takeover measures.

3.2 Current landscape

Since the setting up of ESFRI in 2002 to help coordinate the development of large-scale research facilities in the European Research Area, many of the facilities from the previous roadmaps have now reached their implementation phase and these landmarks can be taken as examples for the decisions to be taken for DiSSCo.

DiSSCo has been accepted on the ESFRI Roadmap in the Environment Domain in 2018. Among the 18 projects on this roadmap many have already selected the headquarters of the RI but their legal status is still under decision or creation. In order to analyse the current situation and collect information from other RI on their LE model selection process, we have drafted the list of the RIs, their type, the legal entity model or to be chosen, entry date on the roadmap and objectives. See the table in Annex 1.

Among the six RI put on the ESFRI roadmap in 2018 including DiSSCo, four have not yet decided on their legal entity model and two are going for an ERIC, there are MetroFood RI from the Health and Food domain, and EHRI (European Holocaust Research Infrastructure) from the Socio and cultural

innovation domain which study under its preparatory phase has led it to choose for an ERIC.⁵ Among the 37 RI that are now considered as ESFRI Landmarks, that is “RIs that were implemented or have reached an advanced Implementation Phase”⁶, 18 which are distributed as DiSSCo have chosen for an ERIC, 4 distributed RI for an AISBL, while the RI ELIXIR chose the Consortium agreement and the RI Infrafrontier the GMBH.⁷ According to this report and the practices from other RIs the ERIC model is the most used compared to other models. According to recent exchanges with the project managers responsible from ACTRIS, eLTER and Windscanner.eu these three RIs have opted for the ERIC model. A further study on the actual functioning and satisfaction of these RI will be performed and provided under the Deliverable 7.2.

⁵ Deliverable 2.2 Selection and Analysis of the Legal Frameworks for Distributed Research Infrastructures and the preferred model for European Holocaust Research Infrastructure <https://ehri-project.eu/sites/default/files/downloads/Deliverables/EHRI%20-%20PP%20DL%202.2%20-%20Selection%20of%20legal%20form%20and%20model%20for%20EHRI.pdf>

⁶ ESFRI Roadmap 2018 Strategy Report on Research Infrastructures p.12
<http://roadmap2018.esfri.eu/media/1048/rm2018-part1-20.pdf>

⁷ List of Landmarks ESFRI Roadmap 2018 Strategy Report on Research Infrastructures p.17
<http://roadmap2018.esfri.eu/media/1048/rm2018-part1-20.pdf>

Table 1: ESFRI projects on the 2018 Roadmap. Added legal statutes in *italics* of the models chosen from some of the Research Infrastructures.

Name	Full name	Type	Legal status (y)	roadmap entry (y)	Operation start (y)	Capital value (M€)	Operation costs (M€/y)
EU-SOLARIS	European Solar Research Infrastructure for Concentrated Solar Power	distributed	Going for an ERIC	2010	2020*	6	0.2
IFMIF-DONES	International Fusion Materials Irradiation Facility - DEMO Oriented NEutron Source	single-sited		2018	2029*	420	50
MYRRHA	Multi-purpose hYbrid Research Reactor for High-tech Applications	single-sited	<i>International Non profit Organisation</i>	2010	2027*	1.352	74
WindScanner	European WindScanner Facility	distributed	<i>To become an ERIC</i>	2010	2021*	6.1	2
ACTRIS	Aerosols, Clouds and Trace gases Research Infrastructure	distributed	<i>Ongoing ERIC</i>	2016	2025*	190	50
DANUBIUS-RI	International Centre for Advanced Studies on River-Sea Systems	distributed		2016	2022*	222	28
DiSSCo	Distributed System of Scientific Collections	distributed		2018	2025*	69.4	12.1
eLTER	Integrated European Long-Term Ecosystem, critical zone and socio-ecological system Research Infrastructure	distributed	<i>Will go for an ERIC</i>	2018	2026*	94	35
AnaEE	Infrastructure for Analysis and Experimentation on Ecosystems	distributed	ERIC Step1, 2018	2010	2019*	1.1	0.8
EMPHASIS	European Infrastructure for Multi-scale Plant Phenomics and Simulation	distributed		2016	2021*	73	3.6
EU-IBISBA	Industrial Biotechnology Innovation and Synthetic Biology Accelerator	distributed		2018	2025*	11	65.1
ISBE	Infrastructure for System Biology Europe	distributed		2010	2019*	10	5.2
METROFOOD-RI	Infrastructure for promoting Metrology in Food and Nutrition	distributed	<i>Ongoing ERIC</i>	2018	2019*	78.8	31

MIRRI	Microbial Resource Research Infrastructure	distributed		2010	2021*	0.8	0.7
EST	European Solar Telescope	single-sited		2016	2029*	200	12
KM3NeT 2.0	KM3 Neutrino Telescope 2.0	distributed		2016	2020*	151	3
E-RIHS	European Research Infrastructure for Heritage Science	distributed		2016	2025*	20	5
EHRI	European Holocaust Research Infrastructure	distributed	<i>Ongoing ERIC</i>	2018	2022*	0.8	2

Table 2: List of ESFRI Landmarks in implementation phase.

Name	Full name	Type	Legal status (y)	road map entry (y)	Operation start (y)	Capital value (M€)	Operation costs (M€/y)
ECCSEL ERIC	European Carbon Dioxide Capture and Storage Laboratory Infrastructure	distributed	ERIC, 2017	2008	2016	1.000	0.85
JHR	Jules Horowitz Reactor	single-sited		2006	2022*	1.800	NA
EISCAT_3D	Next generation European Incoherent Scatter radar system	single-sited	EISCAT Scientific Association, 1975	2008	2022*	123	5.1
EMSO ERIC	European Multidisciplinary Seafloor and water-column Observatory	distributed	ERIC, 2016	2006	2016	100	20
EPOS	European Plate Observing System	distributed	ERIC Step2, 2018	2008	2020*	500	18
EURO-ARGO ERIC	European contribution to the international Argo Programme	distributed	ERIC, 2014	2006	2014	10	8
IAGOS	In-service Aircraft for a Global Observing System	distributed	AISBL, 2014	2006	2014	9.2	7
ICOS ERIC	Integrated Carbon Observation System	distributed	ERIC, 2015	2006	2016	116	24.2
LifeWatch ERIC	e-Infrastructure for Biodiversity and Ecosystem Research	distributed	ERIC, 2017	2006	2017	150	12

BBMRI ERIC	Biobanking and BioMolecular Resources Research Infrastructure	distributed	ERIC, 2013	2006	2014	195	3.5
EATRIS ERIC	European Advanced Translational Research Infrastructure in Medicine	distributed	ERIC, 2013	2006	2013	500	2.5
ECRIN ERIC	European Clinical Research Infrastructure Network	distributed	ERIC, 2013	2006	2014	5	5
ELIXIR	A distributed infrastructure for life-science information	distributed	ELIXIR Consortium Agreement, 2013	2006	2014	125	95
EMBRC ERIC	European Marine Biological Resource Centre	distributed	ERIC, 2018	2008	2017	164.4	11.2
ERINHA	European Research Infrastructure on Highly Pathogenic Agents	distributed	AISBL, 2017	2008	2018	5.8	0.7
EU-OPENSREEN ERIC	European Infrastructure of Open Screening Platforms for Chemical Biology	distributed	ERIC, 2018	2008	2019*	82.3	1.2
Euro-BiImaging	European Research Infrastructure for Imaging Technologies in Biological and Biomedical Sciences	distributed	ERIC Step2, 2018	2008	2016	90	1.6
INFRAFRONTIER	European Research Infrastructure for the generation, phenotyping, archiving and distribution of mouse disease models	distributed	GmbH, 2013	2006	2013	180	80
INSTRUCT ERIC	Integrated Structural Biology Infrastructure	distributed	ERIC, 2017	2006	2017	400	30
CTA	Cherenkov Telescope Array	single-sited	gGmbH, 2014	2008	2024*	400	20
ELI	Extreme Light Infrastructure	distributed	AISBL, 2013	2006	2018	850	80
ELT	Extremely Large Telescope	single-sited	ESO#	2006	2024*	1.120	45
EMFL	European Magnetic Field Laboratory	distributed	AISBL, 2015	2008	2014	170	20
ESRF EBS	European Synchrotron Radiation Facility Extremely Brilliant Source	single-sited	ESRF#	2016	2023*	128	82
European Spallation Source ERIC	European Spallation Source	single-sited	ERIC, 2015	2006	2025*	1.843	140

European XFEL	European X-Ray Free-Electron Laser Facility	single-sited	European XFEL _#	2006	2017	1.490	118
FAIR	Facility for Antiproton and Ion Research	single-sited	GmbH, 2010	2006	2025*	NA	234
HL-LHC	High-Luminosity Large Hadron Collider	single-sited	CERN _#	2016	2026*	1.408	136
ILL	Institut Max von Laue-Paul Langevin	single-sited	ILL _#	2006	2020*	188	97
SKA	Square Kilometre Array	single-sited		2006	2027*	1.000	77
SPIRAL2	Système de Production d'Ions Radioactifs en Ligne de 2e génération	single-sited	GANIL	2006	2019*	281	6
CESSDA ERIC	Consortium of European Social Science Data Archives	distributed	ERIC, 2017	2006	2013	117	39
CLARIN ERIC	Common Language Resources and Technology Infrastructure	distributed	ERIC, 2012	2006	2012	NA	14
DARIAH ERIC	Digital Research Infrastructure for the Arts and Humanities	distributed	ERIC, 2014	2006	2019*	NA	0.7
ESS ERIC	European Social Survey	distributed	ERIC, 2013	2006	2013	NA	2.5
SHARE ERIC	Survey of Health, Ageing and Retirement in Europe	distributed	ERIC, 2011	2006	2011	250	18
PRACE	Partnership for Advanced Computing in Europe	distributed	AISBL, 2010	2006	2010	500	60

3.3 Methodology

DPP Task 7.2 “Towards the creation of a legal entity” has been tackled throughout various meetings organised since the beginning of the DPP project. Since DPP WP7 Kick-off meeting in June 8 2020, another 7 meetings have taken place until end of 2020, among which 4 meetings gathered all WP7 partners and 3 meetings were focused on T. 7.2 with the task partners that are in addition to RBINS, Naturalis, CETAF, MNHN and Meise BG.

The process discussed with the partners was first to :

- 1) identify the criteria and characteristics of the DiSSCo objectives and governance.
- 2) screen other RIs from the same Environment Domain, with the same distributed type and entered on the 2018 Roadmap. But also obtain experiences from other RIs belonging to other domains that have chosen to become a legal entity.
- 3) obtain the support of a legal advisor to go deeper in the legal assets of each entity models available for DiSSCo.

- a) In order to best identify the LE model that would fit DiSSCo objectives the first step was to go back to the Memorandum of Understanding on which the DiSSCo initiative and its current governance are based. This agreement is setting the objectives and goals of DiSSCo and provides the criteria to be used to select the LE model that would best fit DiSSCo purposes:
- Bringing scientific collections to the information age, investing in a linked open data approach;
 - Investing in balanced multi-modal access to collections;
 - Improving researchers' capacity to use collection information to tackle complex scientific challenges;
 - Supporting the interplay of social and cultural aspects of collection data;
 - Developing and implementing targeted joint research agendas;
 - Identifying collection data at European level and improving curation efficiency;
 - Building and supporting paths to industrial innovation;
 - Enhancing digital skills and competencies, tooling-up researchers to navigate the big data domain; and
 - Engaging with society, providing alternative ways of benefiting from the national investments to collections.
- b) A table was developed to collect the data related to the various forms of Legal entity models and their description, the various Research Infrastructures and the chosen LE model.
- c) In order to gain a thorough understanding of the legal forms and models available we relied on the expertise of a legal adviser from the company X-Officio, Ohad Graber-Soudry, recommended by our partner Naturalis for his experience with ESFRI legal procedures and the creation of European RI entities. The legal advisor has been supporting the task in the identification within the RI landscape of those legal models that would best match with the characteristics that apply to DiSSCo and the study performed has provided us with a legal approach for the analysis of the RI examples and governance models at work. A first set of listings of the various existing Legal entity types and of Research Infrastructures and their models were shared with the legal advisor, as well as criteria and questions that the partners agreed on as main primary concerns and wishes that the LE would enable DiSSCo to do and support.

Table 3: List of key questions and requirements provided to the legal advisor.

Institutions & organizations and governments must have their say, scope of the voting right/membership;
Legal capacity recognized in all participating countries: does the LE model allow the same level of engagement whatever the country the partners/members belong to ?;
How simple and fast is the establishment process?;
What is the procurement regime (including VAT and excise regime)?;
Does the LE model allow non-for-profit commercial activities?
Are there initial capital requirements for incorporation?
What is the liability regime for the legal entity itself, the governing body and for the members?
How flexible is the governance structure?
Ability to receive EU and national grants, to contract with public and private third parties; hire personnel, buy equipment
Ability to get bank loans

3.4 Highlights on RIs choice for a model

Among the Research infrastructures that went through the screening by the partners, the motivation and criteria leading to the choice of the Legal entity model often rely on the nature of the RI or on the timeframe it is experiencing.

3.4.1 ERIC as a Model

The choice for an ERIC lies, as it is the case for the Research infrastructure European Marine Biological Research Center (EMBRC), established as EMBRC ERIC in 2018, in the wish to be a centralised organisation with a distributed operation, based on a subsidiarity model based on the operation of a central European-level hub for the coordination of services and activities rendered by all EMBRC nodes. The RI maintains a central hub, comprising a Director and a Secretariat. The user services will be performed on-site at EMBRC nodes¹⁰ in multiple locations and in different countries. The EMBRC-ERIC will be run by state-level governance and managed by the independent EMBRC-ERIC Director assisted by the EMBRC-ERIC Secretariat, which will manage the access to the available resources as well as the services and activities carried out by the EMBRC nodes.

A similar list of criteria is to be found among several RIs business plans which opted for an ERIC like the list of criteria from the Windscanner-ERIC⁸, an RI in the Energy Domain from the 2010 roadmap:

- Short time of implementation
- Complexity of setting up
- Suitable for research institutions and universities
- The legal form is European/international and recognized in EU countries
- Support access to available funding
- Flexible concerning membership levels
- Strong National Nodes with ownership
- Not-for-profit, but not excluding relations with industry
- Tax exemption
- Supports decision of hub location.

3.4.2 AISBL as a model

Looking at the RI that have opted for the AISBL model, we find the European Open Science Cloud (EOSC) which has officially been created as an AISBL on July 2nd 2020⁹. The choice of the AISBL model was motivated by the wish to be as open as possible to all interested parties (providers, users, stakeholders) and enable all stakeholders to become a member and vote, and not restrain to only 1 voting member country. EOSC RI has also for ambition to attract the private sector in order to obtain funding which is linked to the nature of this RI and to the variety of its stakeholders, activities and objectives. EOSC RI created a working group dedicated to the creation of their Legal Entity which reported to the partners, in addition to which consultants and companies were hired to perform the study. EOSC went for an AISBL for time constraints, although an ERIC would have enabled the Member States to have a decision role in the association. The AISBL model does not ensure that

⁸ Business Plan Windscanner.eu ERIC <https://www.windscanner.eu/>

⁹ European Open Science Cloud AISBL <https://www.eoscsecretariat.eu/application-joining-eosc-association>

decision making remains at country level, rather the decision is taken by a steering body, where each country can designate 1 institution officially mandated. The bylaws of the EOSC RI AISBL refers to the institution that is designated to vote in the name of the country, as well as other regular members that can vote and observers that do not vote. The model suits the EOSC purpose to enable all providers, users and stakeholders to be members and have the right to vote. EOSC RI is currently in the beginning of its implementation phase.

3.4.3 The Role of CETAF

As it has been very well established notably through ICEDIG Project D9.4 “CETAF has been central to the design and development of a new overarching RI for natural science collections across Europe, DiSSCo. CETAF plays a pivotal role in the mobilization of community engagement for the DiSSCo initiative and underpins the business case for DiSSCo, bringing more than 20 years of experience to the task of constructing the DiSSCo RI. CETAF will continue to play an essential role in DiSSCo as part of mutual efforts to transform a dispersed and fragmented model for providing access to collections and associated data into an integrated data-driven pan-European research infrastructure.

CETAF has been a leading supporter for DiSSCo through the participation of the CETAF Executive Director in the DiSSCo Coordination Team, and by the CETAF Chair’s position on the DiSSCo Steering Committee. This has enabled CETAF to build consensus throughout its membership on DiSSCo’s overarching scientific, technical and governance vision. CETAF has sought to align the goals of DiSSCo with the strategic position and objectives of the CETAF community. Moreover, CETAF has worked intensively to inform, disseminate and reach out to stakeholders, acting as a leading advocate for the DiSSCo RI. The long history of collaborative projects, initiatives and outcomes undertaken within CETAF led to the classification of our consortium as a “super-advanced community” by the European Commission. CETAF’s participation in the landscape of environmental RIs, like the ENVRI-FAIR project and the Board of European Environmental RIs (BEERi), has also helped strategically to integrate DiSSCo into the biodiversity-geodiversity research landscape.”

Considering this prominent role in the community, CETAF has therefore the legitimacy to have a specific place within the decision making process and governance of DiSSCo.

04. STUDY OF THE MODELS BY THE LEGAL EXPERT

4.1 Methodology & criteria

The following six legal entity models

- International/Intergovernmental Organisation (IO)
- European Research Infrastructure Consortium (ERIC)
- European Economic Interest Grouping (EEIG)
- European Groupings of Territorial Cooperation (EGTC)
- Belgian AISBL
- Dutch Stichting

have be screened according to 15 points of attention:

1. Is it a separate legal entity?
2. Does it have the capacity to contract with third parties, hire personnel, open a bank account, buy equipment, sue and be sued, etc.?
3. Can institutions from EU/EEA Member States be members?
4. Can institutions from non-EU/EEA Member States be members?
5. Can EU/EEA governments (ministries) be members?
6. Can non-EU government (ministries) be members?
7. Is the establishment process simple and fast?
8. is the legal entity exempted from the EU public procurement directives (Art. 9(1)(b) Directive 2014/24/EU)?
9. Is the legal entity exempted from VAT (in the sense of Articles 143(1)(g) and 151(1)(b) of the VAT Directive)?
10. Is the legal entity able to carry out economic activities?
11. No initial capital requirements.
12. Is there a limited liability regime (legal entity, governing body and for members)?
13. Is the governance structure flexible?
14. Is the legal entity able to receive EU and national grants?
15. Is the legal entity able to contract bank loans?

On the basis of this first screening, the partners associated with Task 7.2 selected what appeared to them as the most suitable legal entity models for DiSSCo. The legal adviser then further documented the short-listed models and made some recommendations.

4.2 First phase of the study

The findings summarized in the table hereafter are as follows (quoting from the legal adviser's report):

International/Intergovernmental Organisation

*While the IO benefits from the flexibility to develop its statutes in a way that best fits its needs, the governance of the IO could become very formal and complex. The fact that governments will need to complete their national process of ratification of the treaty means that it will take several years before they can join as members. The long establishment process and the significant resources required in order to establish and manage an IO suggest that this form of legal entity is **less suitable** for DiSSCo.*

ERIC

The ERIC is a legal form designed specifically to facilitate the establishment and operation of research infrastructures. It includes arrangements that, similar to IO, would facilitate cross-border cooperation and financing but avoid the lengthy and complex legal negotiations and administrative processes that precede the establishment of IOs. Besides being tailored to the needs of setting-up and operating (distributed) European research infrastructures, it also gained much popularity in recent years and initiatives such as the ERIC Forum (previously the ERIC Network) facilitate cooperation among all existing and potential ERICs and could contribute to DiSSCo's image and activities. The only drawback with the ERIC is that only governments and IOs may join

as members, however, institutions may be appointed as representing entities and may also take part in the various committees. The ERIC legal entity is **potentially suitable** for DiSSCo.

EEIG

The EEIG could be an alternative for the ERIC however it has two major drawbacks: (1) it requires members' unlimited liability and (2) it forbids membership by institutions or governments from non-EU/EEA countries. As such, the EEIG is **less suitable** for DiSSCo.

EGTC

The EGTC is designed either for the purpose of implementing territorial cooperation programmes (i.e., Interreg) or projects co-financed under the Structural Funds (i.e., ERDF and ESF) or for the purpose of carrying out actions of territorial cooperation which are at the sole initiative of the Member States. As such, this form of legal entity is **less suitable** for DiSSCo.

AISBL

The AISBL seems to fit all the criteria examined in this document except for the exemption granted to international organisations (and ERICs) from the procurement and VAT directives. If the volume of purchases envisaged to be made by DiSSCo are not significant, then the AISBL legal entity is **potentially suitable** for DiSSCo.

Dutch Stichting

The Dutch Stichting is similar to the AISBL in many ways, but few differences can be highlighted:

1. The Stichting does not have membership or shareholders and is not controlled by any member or shareholder. Instead it needs to have a board of directors, which has full control over the Stichting;
2. Compared to the AISBL, the Stichting does not have the same international dimension, although there is nothing to prevent international representation in the board of directors of the Stichting;
3. There seem to be fewer examples of research infrastructures set up under a Dutch Stichting legal entity.

If the intention is to have the headquarters of DiSSCo in the Netherlands, a Stichting could be useful from the point of view that it is governed by Dutch law. As such the Stichting legal entity is **potentially suitable** for DiSSCo but only if the DiSSCo headquarters will be based in the Netherlands.

The detailed results of the screening is given in the table below, where



means fully compliant/"Yes";



means compliant/"Yes", but subject to additional conditions or restrictions;



means not compliant/"No".

	<i>IO</i>	<i>ERIC</i>	<i>EEIG</i>	<i>EGTC</i>	<i>AISBL</i>	<i>STICHTING</i>
A separate legal entity	✓	✓	✓	✓	✓	✓
Capacity to contract with third parties	✓	✓	✓	✓	✓	✓
Membership by institutions from EU/EEA Member States	✗	✗	✓	⚠	✓	⚠
Membership by institutions from non-EU/EEA Member States	✗	✗	✗	⚠	✓	⚠
Membership by EU/EEA governments (ministries)	✓	✓	✗	✓	⚠	⚠
Membership by non-EU government (ministries)	✓	✓	✗	✓	⚠	⚠
Simple and fast establishment process	✗	⚠	✓	⚠	✓	✓
Exemption from the EU procurement directives ¹⁵	✓	✓	✗	✗	✗	✗
Exemption from VAT ¹⁶	✓	✓	✗	✗	✗	✗
Ability to carry out economic activities	✓	⚠	⚠	⚠	✓	✓
No initial capital requirements	✓	✓	✓	✓	✓	✓
Limited liability regime	✓	✓	✗	⚠	✓	✓
<u>A flexible governance structure</u>	⚠	⚠	✓	⚠	✓	✓
Ability to receive EU and national grants	⚠	✓	✓	⚠	✓	✓
Ability to contract bank loans	✓	✓	✓	✓	✓	✓

Looking at the pros and cons that make a given model more or less suitable for the purpose of establishing DiSSCo as a legal entity, the partners associated with the task decide to narrow the list of models under consideration to three of them:

- International organization
- ERIC
- AISBL

Nota Bene: although potentially suitable, the model of the Dutch Stichting was not further analyzed at this stage, due to time constraints and its similarity, to some extent, to the AISBL. It might come into consideration again, should the discussions on where DiSSCo should be located make it a more relevant option.

4.3 Second phase of the study.

The in-depth and comparative analysis of the three short-listed models (see Annex) leads first to setting aside the International Organisation model. Indeed the IO provides similar advantages than an ERIC but requires much more effort and duration to obtain the approval from various levels of authorities to be established.

Therefore, the ERIC and AISBL seem to be the most suitable legal vehicles for DiSSCo. There are however a number of differentiating factors that are relevant in light of the special characteristics of DiSSCo as a distributed research infrastructure. These differentiating factors could potentially suggest that one of the legal entities is preferred over the other. The comparison of the AISBL and the ERIC models made by the legal advisor can be qualitatively summarized as follows (our own assessment):

Table 4: Comparative assessment of the AISBL and ERIC models according to differentiating factors. “++” means that the model is very suitable or flexible, “+” that the model is also suitable or flexible but less, and “+/-” that the model although still suitable or flexible shows some limitations or constraints. (For the details, see Annex Section 7.2 AISBL vs. ERIC p. 26)

	AISBL	ERIC
Level of integration between the DiSSCo legal entity and the national nodes	+	++
Location of the statutory seat	+	++
Language to be used for the official documents	+	++
Membership	Institutions, individuals	Countries, IOs
Participation by CETAF	++	+
“Branding” and network possibilities	+	++
Procurement and VAT considerations	+/-	++
Tailor-made governance structure	+	++
Securing funding	+/-	++

05. Conclusion

The legal adviser concludes this analysis as follows:

The analysis above suggests that, while both the AISBL and ERIC are suitable as a long-term legal entity for DiSSCo, the ERIC emerges as a preferable and a better tailored legal entity for DiSSCo. Assuming that the support by governmental representatives is secured, the only significant weakness of the ERIC alternative is that direct membership by participating institutions, in particular CETAF, is not possible. A number of mitigation steps could be implemented in order to grant CETAF certain rights (and obligations) including the possibility to attend the meetings of the General Assembly and have a say in the decision-making process. Such mitigation steps should be further considered and could potentially provide sufficient comfort to all parties concerned.

06. Recommendation

On the basis of the analysis by the legal advisor, and the discussions with him and the partners associated with the task, we recommend to proceed to the next steps with the working hypothesis that establishing DiSSCo as an ERIC is the best option, taking into account that adequate mechanisms need to be implemented to allow a prominent role for CETAF.

07. Annex

“A legal entity for DiSSCo”, Report by X-officio.



Annex “A legal entity for DiSSCo”, Report by X-officio

DiSSCo Prepare WP 7 – Milestone 39

Ohad Graber-Soudry, X-officio

REPORT

A LEGAL ENTITY FOR DISSCO

DiSSCo Prepare WP7 T7.2

Legal Entity for DiSSCo
DiSSCo Prepare WP7 T7.2
31 December 2020

EXECUTIVE SUMMARY

This report aims at identifying the most suitable long-term legal entity for DiSSCo. It is structured in two main phases:

Phase 1 (sections 4-6) provides a high-level comparative assessment of six alternative legal entities proposed by the leaders of WP7 T7.2. The six alternatives include:

- International/Intergovernmental Organisation (IO)
- European Research Infrastructure Consortium (ERIC)
- European Economic Interest Grouping (EEIG)
- European Groupings of Territorial Cooperation (EGTC)
- Belgian AISBL
- Dutch Stichting

The assessment is carried out on the basis of 15 criteria that have been identified as relevant for DiSSCo. The purpose of phase 1 is to facilitate an initial short-listing by stakeholders of 3 legal entities for further assessment.

Phase 2 analysis (section 7) looks in greater detail into the short-listed legal entities and makes a final recommendation.

The analysis conducted in this report identifies the AISBL and the ERIC as the most suitable long-term legal entities for DiSSCo with the ERIC being the preferred option. Assuming that the support by governmental representatives is secured, the only significant weakness of the ERIC alternative is that direct membership by participating institutions, in particular CETAF, is not possible. The report recommends that certain mitigation steps should be further considered, aiming at granting CETAF certain rights in the ERIC including the possibility to attend the meetings of the General Assembly and have a say in the decision-making process. Such mitigation steps should be developed separately and could potentially include additional provision in the statutes of the ERIC as well as contractual arrangements between the ERIC and CETAF.

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1. Introduction

This report aims at identifying the most suitable long-term legal entity for DiSSCo. It is structured in two main phases:

Phase 1 (sections 4-6) provides a high-level comparative assessment of six alternatives proposed by the leaders of WP7 T7.2 for a legal entity which DiSSCo could adopt.

The purpose of phase 1 analysis is to facilitate an initial short-listing by stakeholders of 3 legal entities for further assessment.

Phase 2 analysis (section 7) looks in greater detail into the short-listed legal entities and makes a final recommendation.

2. Possible Legal Entities for DiSSCo

The following six legal entities have been proposed by the leaders of WP7 T7.2:

- International/Intergovernmental Organisation (IO)
- European Research Infrastructure Consortium (ERIC)
- European Economic Interest Grouping (EEIG)
- European Groupings of Territorial Cooperation (EGTC)
- Belgian AISBL
- Dutch Stichting

3. Criteria for Assessment

The following criteria for assessment have been requested:

- (1) A separate legal entity;
- (2) Capacity to contract with third parties, hire personnel, open a bank account, buy equipment, sue and be sued, etc.;
- (3) Membership by institutions from EU/EEA Member States;
- (4) Membership by institutions from non-EU/EEA Member States;
- (5) Membership by EU/EEA governments (ministries);
- (6) Membership by non-EU government (ministries);
- (7) A simple and fast establishment process;
- (8) Exemption from the EU public procurement directives (Art. 9(1)(b) Directive 2014/24/EU);
- (9) Exemption from VAT (in the sense of Articles 143(1)(g) and 151(1)(b) of the VAT Directive);
- (10) Ability to carry out economic activities;

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- (11) No initial capital requirements;
- (12) Limited liability regime (legal entity, governing body and for members);
- (13) A flexible governance structure;
- (14) Ability to receive EU and national grants; and,
- (15) Ability to contract bank loans;

4. Short Overview

4.1. International/Intergovernmental Organisation

An international organisation is an entity having a structure and powers defined in its constitutive instrument, i.e., a “treaty”. A treaty means an international agreement concluded between states in written form and governed by international law.¹

A treaty is the only way in which states or governments may create binding legal obligations, distinct from those arising under their national law. The act by which states express their consent to be bound by a treaty is distinct from the treaty’s entry into force. Consent to be bound by the treaty is the act whereby a state demonstrates its willingness to undertake the legal rights and obligations under a treaty through definitive signature or the deposit of an instrument of ratification, acceptance, approval, or accession. Entry into force of a treaty with regard to a state is the moment at which the treaty becomes legally binding for the state that is party to the treaty (although some treaties, may also include provisions for their provisional entry into force). The establishment process of an IO is therefore long and complicated. Examples of research infrastructures established as an IO include mainly large-scale infrastructures that require a large capital investment in construction and operation, such as the European Organization for Nuclear Research (CERN), the European Molecular Biology Laboratory (EMBL) and the Square Kilometre Array (SKA).

4.2. European Research Infrastructure Consortium (ERIC)

A European Research Infrastructure Consortium (ERIC) is a legal framework introduced by Council Regulation (EC) No. 723/2009 (“ERIC Regulation”)² in response to the need for a legal framework for EU-wide entities, in particular, distributed research infrastructures. The objective of the ERIC Regulation is to facilitate the establishment and operation of European research infrastructures involving several Member States. It is based on Article 187 of the Treaty on the Functioning of the European Union, which provides for the setting up of joint undertakings or any other structure necessary for research and technological development.

Since the adoption of the ERIC Regulation in 2009, 21 ERICs have been established and have

¹ See Art. 2(1) of the Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679.

² Council Regulations (EC) No 723/2009 of 25 June 2009 on the Community legal framework for a European Research Infrastructure Consortium (ERIC), (2009) OJ L206, at 1–8

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their statutory seat in 9 Member States³ and in one associated country (Norway). Together they currently have more than 20 Member States and associated countries as members and observers.

4.3. European Economic Interest Grouping (EEIG)

A European Economic Interest Grouping (“EEIG”) is a legal entity created under Council Regulation (EEC) No 2137/85 of 25 July 1985. It must have members based in at least two countries within the EU or the European Economic Area (EEA) and be non-profit making.

The purpose of the EEIG is to facilitate and/or develop the activities of its members by a pooling of resources, activities or skills. This is intended to produce better and more efficient results compared to the members acting alone. Its activities must be related and must not be more than ancillary to the activities of its members.

The EEIG is designed to minimise the “legal, fiscal and psychological difficulties” that natural persons, companies, firms and other bodies face in cooperating across borders within the EU, for instance to form consortia to take part in EU programmes.

While there is a very large number of existing EEIGs (over 2000),⁴ there are very few examples of research infrastructures incorporated under an EEIG. Two of such examples, for research performing network or infrastructures incorporated as EEIG are the EVICR⁵, which is a network of European Ophthalmological Clinical Research Sites and the Agrinatura,⁶ a European Alliance on Agricultural knowledge for Development.

4.4. European Groupings of Territorial Cooperation (EGTC)

The objective of a European Grouping of Territorial Cooperation (EGTC) must be to facilitate and promote “territorial cooperation” (i.e., cross-border, transnational and/or interregional cooperation), including one or more of the cross-border, transnational and interregional strands of cooperation, with the exclusive aim of strengthening the Union economic, social and territorial cohesion. The EGTC should act, either for the purpose of implementing territorial cooperation programmes (i.e., Interreg) or projects co-financed under the Structural Funds (i.e., ERDF and ESF) or for the purpose of carrying out actions of territorial cooperation which are at the sole initiative of the Member States and their regional and local authorities with or without a financial contribution from the EU Commission. There are around 40 existing EGTCs⁷ but there seem to be no known research infrastructures incorporated as EGTC.

³ Germany, Spain, France, Italy, the Netherlands, Austria, Finland, Sweden, the United Kingdom.

⁴ For a full list see: <https://www.libertas-institut.com/wp-content/uploads/2020/01/ewiv-laenderliste.pdf>

⁵ <https://www.evicr.net/about/organisation/>

⁶ <https://agrinatura-eu.eu/>

⁷ See <https://www.libertas-institut.com/wp-content/uploads/2018/08/egtc-list.pdf>

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4.5. Belgian AISBL

The AISBL (“Association internationale sans but lucratif”) is a legal entity used for an international, not-for-profit associations based on Belgian law. It is regulated by the Belgian “Code on Companies and Associations” of 23 March 2019 that came into force on 1 May 2019⁸ and is applicable to all companies, associations and foundations in Belgium and are considered as legal persons of private law. Prominent examples for research infrastructures incorporated as an AISBL are the ELI Laser,⁹ OPERAS¹⁰ (although both are in the process of, or plan to, transit to an ERIC), PRACE,¹¹ COST¹² and most recently, the EOSC association that has been incorporated in the form of an AISBL.

4.6. Dutch Stichting

A Stichting is a foundation established under Dutch law. The Stichting does not have members or shareholders and is considered to be an “orphan entity” (no one "owns" a Stichting). The only requirement is to have a board of directors, which has full control and is the only mandatory governing body. There are more than 200,000 existing entities set up in the form of a Stichting, not only for charitable purposes, but also many of them are used for economic, social and business purposes, including as anti-takeover measures. An example from an e-infrastructure set up as a Dutch Stichting is the EGI Foundation.¹³

5. Initial Assessment (Phase 1)

The following section provides a high-level comparison of the various legal entities in accordance with the assessment criteria set out in section 2. The assessment is followed by a table summarising the results, using the following symbols. There are final recommendations for shortlisting at the end of the document.

✔ means fully compliant with the criterion;

⚠ means compliant with the criterion, but subject to additional conditions/ restrictions;

✘ means not compliant with the criterion.

⁸ Until that date the AISBL was regulated by the “Act on Non-profit Associations and the International Non-profit Associations and Foundations” of 27th June 1921.

⁹ <https://eli-laser.eu/>. Note however that ELI has applied for an ERIC legal entity.

¹⁰ <https://www.operas-eu.org/about/operas-legal-entity/>

¹¹ <https://prace-ri.eu/>

¹² <https://www.cost.eu/>. While not strictly a research infrastructure, COST is an example of an AISBL with governmental membership.

¹³ <https://www.egi.eu/about/egi-foundation/>

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(1) A separate legal entity

International Organisation	A separate legal personality distinct from its members, based on international law.	
ERIC	A separate legal personality distinct from its members, based on European law.	
EEIG	A separate legal personality distinct from its members, based on European law.	
EGTC	A separate legal personality distinct from its members, based on European law. However, any profits or losses resulting from the activities will be taxed in the hands of its members (<i>'fiscal transparency'</i>).	
AISBL	A separate legal personality distinct from its members, based on national law.	
Dutch Stichting	A separate legal personality distinct from its members, based on national law.	

(2) Capacity to contract with third parties, hire personnel, open a bank account, buy equipment, sue and be sued, etc.

International Organisation	Yes.	
ERIC	Yes.	
EEIG	Yes.	
EGTC	Yes.	
AISBL	Yes.	
Dutch Stichting	Yes.	

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(3) Membership by institutions from EU/EEA Member States

International Organisation	No. Only states, or other intergovernmental organisations.	
ERIC	No. Only states and intergovernmental organisations.	
EEIG	Yes.	
EGTC	Yes, but only if they belong to one of the following categories: (1) a national, regional or local authority, (2) a “public undertaking” (3) a “body governed by public law”, (4) an “undertakings entrusted with operations of services of general economic interest”, or (5) associations consisting of bodies belonging to one or more of the above categories.	
AISBL	Yes.	
Dutch Stichting	A Stichting has no membership and no owners, only a board of directors.	

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(4) Membership by institutions from non-EU/EEA Member States

International Organisation	No. Only states, or other intergovernmental organisations.	
ERIC	No. Only states and intergovernmental organisations.	
EEIG	No.	
EGTC	Yes, but only if: (a) their status is equivalent to one of the following categories: (1) a national, regional or local authority, (2) a “public undertaking”, (3) “a body governed by public law”, (4) an “undertakings entrusted with operations of services of general economic interest”, or (5) associations consisting of bodies belonging to one or more of the above categories; AND , (b) they are from a third country that shares a common land border (including maritime borders) with a Member State that is also a member of the EGTC and where they jointly carry out territorial cooperation actions or implement programmes supported by the Union.	
AISBL	Yes.	
Dutch Stichting	A Stichting has no membership and no owners, only a board of directors.	

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(5) Membership by EU/EEA governments (ministries)

International Organisation	Yes.	
ERIC	Yes.	
EEIG	No.	
EGTC	Yes.	
AISBL	Yes. However, the participation of governments may be subject to national approval and procedures and is likely to result in a longer establishment process.	
Dutch Stichting	A Stichting has no membership and no owners, only a board of directors.	

(6) Membership by non-EU government (ministries)

International Organisation	Yes.	
ERIC	Yes, provided that at least one EU Member State and two other countries which are either EU Member States or EU associated countries are members of the ERIC at any given time. Membership requires acceptance of the jurisdiction of the CJEU. ¹⁴	
EEIG	No.	
EGTC	Yes. But only if they share a common land border (including maritime borders) with a Member State that is also a member of the EGTC and where they jointly carry out territorial cooperation actions or implement programmes supported by the Union.	
AISBL	Yes. However, the participation of governments may be subject to national approval and procedures and is likely to result in a longer establishment process.	
Dutch Stichting	A Stichting has no membership and no owners, only a board of directors.	

¹⁴ Court of Justice of the European Union. Note that not all third countries will be willing to do so, but there are examples of third countries (non EU/EEA) that are currently members of an ERIC such as Israel and Serbia.

(7) Simple and fast establishment process

International Organisation	No.	
ERIC	Moderate.	
EEIG	Yes, but may vary, depending on national law.	
EGTC	Moderate.	
AISBL	Yes.	
Dutch Stichting	Yes.	

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(8) Exemption from the EU public procurement directives (Art. 9(1)(b) Directive 2014/24/EU)

International Organisation	Yes.	
ERIC	Yes.	
EEIG	No.	
EGTC	No.	
AISBL	No.	
Dutch Stichting	No.	

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(9) Exemption from VAT (in the sense of Articles 143(1)(g) and 151(1)(b) of the VAT Directive)

International Organisation	Yes.	
ERIC	Yes.	
EEIG	No.	
EGTC	No.	
AISBL	No.	
Dutch Stichting	No.	

(10) Ability to carry out economic activities

International Organisation	Yes (but may be limited by the Treaty).	
ERIC	Limited economic activities related to the ERIC's task. However the ERIC may establish a spin out company without restrictions.	
EEIG	Yes. However, it cannot be formed with the object of making a profit (although it may do so as a consequence of its normal operations). Any economic activity must relate to the economic activities of its members but may not replace them.	
EGTC	Can generate revenues and income from services of general economic interest (SGEI) if they have been included in the EGTC tasks.	
AISBL	Yes (proceeds to be allocated to the realisation of the not-for-profit purpose of the AISBL).	
Dutch Stichting	Yes (profits must be allocated to the purpose of the Stichting).	

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(11) No initial capital requirements

International Organisation	None.	
ERIC	None.	
EEIG	None.	
EGTC	None.	
AISBL	None.	
Dutch Stichting	None.	

(12) Limited liability (legal entity, governing body and members)

International Organisation	Yes (but may be changed by the Treaty).	
ERIC	Yes (but may be changed by the statutes).	
EEIG	No. The members of the EEIG must have unlimited joint and several liability (however it is only a <i>subsidiary liability</i>). There may be ways to bypass this constraint, at least to some extent.	
EGTC	No. However, if the liability of at least one member of the EGTC from a Member State is limited as a result of the national law under which it is established, the other members may also limit their liability in the convention where their national law enables them to do so.	
AISBL	Yes.	
Dutch Stichting	Yes (some exceptions exist in relation to directors' liability).	

(13) A flexible governance structure

International Organisation	Flexibility to develop statutes which fit the needs of the organisation; however, the involvement of governments and the formal nature of an IO will add complexity.	
ERIC	Moderate, due to governmental involvement.	
EEIG	Yes.	
EGTC	Moderate.	
AISBL	Yes.	
Dutch Stichting	Yes.	

(14) Ability to receive EU and national grants

International Organisation	Restrictions apply.	
ERIC	Yes. For EU funds it may also apply as a sole beneficiary (depending on the conditions). Not eligible for national funds in some of the Member States.	
EEIG	Yes. National funds in the Member State of establishment.	
EGTC	EGTCs may benefit from European Territorial Cooperation (ETC) funding and also from other Cohesion Policy programmes and other EU sector policies. Outside ETC, however, the EGTC is not entitled to apply as sole beneficiary but may apply in the same way as any other public institution. EGTC may benefit from relevant national funding in the Member States where it is established, depending on the specific conditions of the grant.	
AISBL	Yes. National funds likely to be restricted to the Member State of establishment.	
Dutch Stichting	Yes. National funds likely to be restricted to the Member State of establishment.	

(15) Ability to contract bank loans

International Organisation	Yes, subject to the bank's due diligence.	
ERIC	Yes, subject to the bank's due diligence.	
EEIG	Yes, subject to the bank's due diligence.	
EGTC	Yes, subject to the bank's due diligence.	
AISBL	Yes, subject to the bank's due diligence.	
Dutch Stichting	Yes, subject to the bank's due diligence.	

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	<i>IO</i>	<i>ERIC</i>	<i>EEIG</i>	<i>EGTC</i>	<i>AISBL</i>	<i>STICHTING</i>
A separate legal entity	✓	✓	✓	✓	✓	✓
Capacity to contract with third parties	✓	✓	✓	✓	✓	✓
Membership by institutions from EU/EEA Member States	✗	✗	✓	⚠	✓	⚠
Membership by institutions from non-EU/EEA Member States	✗	✗	✗	⚠	✓	⚠
Membership by EU/EEA governments (ministries)	✓	✓	✗	✓	⚠	⚠
Membership by non-EU government (ministries)	✓	✓	✗	✓	⚠	⚠
Simple and fast establishment process	✗	⚠	✓	⚠	✓	✓
Exemption from the EU procurement directives¹⁵	✓	✓	✗	✗	✗	✗
Exemption from VAT¹⁶	✓	✓	✗	✗	✗	✗
Ability to carry out economic activities	✓	⚠	⚠	⚠	✓	✓
No initial capital requirements	✓	✓	✓	✓	✓	✓
Limited liability regime	✓	✓	✗	⚠	✓	✓
A flexible governance structure	⚠	⚠	✓	⚠	✓	✓
Ability to receive EU and national grants	⚠	✓	✓	⚠	✓	✓
Ability to contract bank loans	✓	✓	✓	✓	✓	✓

¹⁵ In accordance with Art. 9(1)(b) Directive 2014/24/EU.

¹⁶ In the sense of Articles 143(1)(g) and 151(1)(b) of the VAT Directive.

6. Shortlisting

The following recommendations for shortlisting can be inferred from the above analysis:

International/Intergovernmental Organisation

While the IO benefit from the flexibility to develop its statutes in a way that best fit its needs, the governance of the IO could become very formal and complex. The fact that governments will need to complete their national process of ratification of the treaty means that it will take several years before they can join as members. The long establishment process and the significant resources required in order to establish and manage an IO suggest that this form of legal entity is **less suitable** for DiSSCo.

ERIC

The ERIC is a legal form designed specifically to facilitate the establishment and operation of research infrastructures. It includes arrangements that, similar to IO, would facilitate cross-border cooperation and financing but avoid the lengthy and complex legal negotiations and administrative processes that precede the establishment of IOs. Besides being tailored to the needs of setting-up and operating (distributed) European research infrastructures, it also gained much popularity in recent years and initiatives such as the ERIC Forum (previously the ERIC Network) facilitate cooperation among all existing and potential ERICs and could contribute to DiSSCo's image and activities. The only drawback with the ERIC is that only governments and IOs may join as members, however, institutions may be appointed as representing entities and may also take part in the various committees. The ERIC legal entity is **potentially suitable** for DiSSCo.

EEIG

The EEIG could be an alternative for the ERIC however it has two major drawbacks: (1) it requires members' unlimited liability and (2) it forbids membership by institutions or governments from non-EU/EEA countries. As such, the EEIG is **less suitable** for DiSSCo.

EGTC

The EGTC is designed either for the purpose of implementing territorial cooperation programmes (i.e., Interreg) or projects co-financed under the Structural Funds (i.e., ERDF and ESF) or for the purpose of carrying out actions of territorial cooperation which are at the sole initiative of the Member States. As such, this form of legal entity is **less suitable** for DiSSCo.

AISBL

The AISBL seems to fit all the criteria examined in this document except for the exemption granted to international organisations (and ERICs) from the procurement and VAT directives.

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If the volume of purchases envisaged to be made by DiSSCo are not significant, then the AISBL legal entity is **potentially suitable** for DiSSCo.

Dutch Stichting

The Dutch Stichting is similar to the AISBL in many ways, but few differences can be highlighted: (1) The Stichting does not have membership or shareholders and is not controlled by any member or shareholder. Instead it needs to have a board of directors, which has full control over the Stichting; (2) Compared to the AISBL, the Stichting does not have the same international dimension, although there is nothing to prevent international representation in the board of directors of the Stichting; (3) There seem to be fewer examples of research infrastructures set up under a Dutch Stichting legal entity.

If the intention is to have the headquarters of DiSSCo in the Netherlands, a Stichting could be useful from the point of view that it is governed by Dutch law. As such the Stichting legal entity is **potentially suitable** for DiSSCo but only if the DiSSCo headquarters will be based in the Netherlands.

7. Further Assessment (phase 2)

On 25 November 2020 WP7 T7.2 task members met in order to assess the initial recommendations for shortlisting set out in section 6 above. The task members decided to shortlist the following legal entities for further assessment:

- International Organisation
- AISBL
- ERIC

The following sections will focus on the above legal entities and provide a recommendation.

7.1. International Organisation

IOs are commonly used as a legal vehicle for very large research infrastructures that are characterised by a significant capital investment and high operation costs. Prominent examples of research infrastructures set up as an IO include CERN (the European Organization for Nuclear Research); the EMBL (The European Molecular Biology Laboratory) and more recently, the SKA telescope (The Square Kilometre Array) which is a radio telescope project being built in Australia and South Africa with headquarters in the UK.

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There are two significant weaknesses associated with the possibility of establishing DiSSCo as an IO:

- A lengthy establishment process – characterised by a complex treaty negotiation period followed by a lengthy ratification process involving parliaments of the potential member countries.
- High administrative costs – concerning both the establishment and operation of an IO. Given its independency from the national legal system, the IO will require a larger administrative function, with personnel costs that are more costly due to the international status of the organisation and the benefits employees of IOs usually enjoy.

The significance of these weaknesses cannot be underestimated, and the choice of an IO could only be justified if the benefits it brings about outweigh the above weaknesses. However, the assessment carried out above does not identify any significant advantages that the IO provides, for example, when compared to the ERIC legal entity. Seen from that perspective, the ERIC is preferable over the IO as it provides similar advantages (i.e., exemption from procurement and VAT, membership by countries, a European/International dimension, etc.) while avoiding the weaknesses that are associated with the establishment and operation of an IO. The IO option should therefore be discounted, in particular, given the availability of the ERIC.

7.2. AISBL v. ERIC

The ERIC and AISBL are the most suitable legal vehicles for DiSSCo. There are however a number of differentiating factors that are relevant in light of the special characteristics of DiSSCo as a distributed research infrastructure. These differentiating factors could potentially suggest that one of the legal entities is preferred over the other:

Level of integration between the DiSSCo legal entity and the national nodes: Given the legal bases upon which the AISBL and the ERIC are established (national vs. European), there will be differences in the ability to maximise long-term integration between the headquarters and the nodes of DiSSCo. The ERIC legal framework, being based on EU law and having ‘the most extensive legal capacity recognised in all EU Member States, provides for a broader potential for integration either as one DiSSCo legal entity operating in different Member States or as a central hub coordinating several distributed facilities (not necessarily part of the same legal entity). The AISBL, in contrast, does not provide for the possibility for a decentralised legal personality over a number of Member States and will only allow participation in the form of membership by the nodes, or by their host institution (e.g., a museum, a research institution, a university, etc.). Seen from that perspective, the AISBL is

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more suitable for a loose network of participating institutions while the ERIC offers broader possibilities for integration.

Statutory seat: similarly, the nature of the ERIC as a legal entity based on European law allows its establishment in any one of the Member states (including Norway). This fact facilitates full alignment between the location of the legal seat (i.e., the place of registration) and the operational headquarters. The AISBL, in contrast, may only be established in Belgium, so if the operational headquarters is established outside of Belgium, two legal systems (the Belgian legal system and the ‘effective’ host country legal system) will need to be consulted. This also means that a certain degree of familiarity with Belgian law and practice will have to be developed even if there are no operations in Belgium, implying an additional cost of administration. Furthermore, there is a risk, albeit not a significant one, for potential gaps or incoherencies between the two legal systems in case the headquarters is placed outside of Belgium. The ERIC is less likely to be subject to such a risk due to the fact that it enjoys full legal capacity in all EU Member States and it is tailor-made for distributed research infrastructures.

Language: the AISBL requires that the statutes and related governing documents e.g., the minutes of the annual meetings, are drafted in one of the official languages of Belgium (Dutch or French or if the registered office is located in the German-speaking community, in German,). A translation into English will therefore need to be made available for members. This may impose an additional administrative burden.

Membership: The ERIC only allows governments (ministries) and IOs to become members of the ERIC, whereas membership of governments in the AISBL is considered to be exceptional and is likely to complicate the process of establishment. Conversely, direct membership by participating institutions is not allowed by the ERIC legal entity but is possible with the AISBL. Some research infrastructures that opted for the AISBL (at least as an interim solution) did so because they were unable to secure the required level of support from their national ministries. This may be less relevant for DiSSCo if governmental representatives are already involved in the research infrastructure and have expressed their support. Furthermore, members of the ERIC (i.e., governments) may be represented by one or more public entities or private entities with a public service mission, thus allowing institutions to be directly involved in the meetings of the General Assembly and other governing bodies of the ERIC, provided they have been appointed as such by their respective governments or ministries.

Participation by CETAF: CETAF (being an AISBL in its own right) will not be able to join as a full member of an ERIC and it is our understanding that it is unlikely that it could be appointed as a representative entity by a relevant member (i.e., Belgium). Thus, CETAF can only become a member of the General Assembly and be granted full rights, including voting rights, in case of an AISBL but not in the case of an ERIC. This seems to be a significant

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weakness in the proposed ERIC legal entity, but if the ERIC legal vehicle is nevertheless chosen, a number of mitigation steps could be implemented in order to grant CETAF certain rights (and obligations) including the possibility to attend the General Assembly meetings and have a say in the decision-making process. Such mitigation steps should be considered separately, but they could in principle combine specific provisions in the statutes of the ERIC and special contractual arrangements between the ERIC and CETAF.

Stronger brand for European research infrastructures and network possibilities: The ERIC has a stronger brand in the research-infrastructures community (compared to the AISBL) and enjoys better access to networking possibilities with similar research infrastructures outside its scientific discipline. For example, the ERIC Forum tries to bring together all existing and candidate ERICs in an attempt to strengthen their coordination and address common challenges while developing best practices. In addition, from a political and public relations perspective, the ERIC provides for a truly European dimension and, as such, is more likely to have legitimacy and support by the various ministries and national funding bodies. The AISBL, on the other hand, may face a degree of hesitation by participating ministries and by national funding entities, which are less likely to be comfortable with joining a research infrastructure that is based on national (from their perspective, foreign) law.

Procurement and VAT considerations: The ERIC enjoys specific exemptions from the EU (and implementing national) legislation on public procurement and from the VAT directive. The AISBL will likely be subject to the Belgian public procurement law. Further investigation is required in order to verify whether the AISBL will be able to recover or to be exempt from paying any input VAT (i.e., any VAT added to the price of goods or services purchased by the AISBL). Any such possibility will depend on Belgian law. This consideration may be less important if it is not envisaged that DiSSCo will engage in significant purchasing and procurement activity.

Tailor-made governance structure: Although both legal frameworks offer a flexible governance structure, the AISBL (in contrast to the ERIC) is not tailor-made for the needs of a pan-European research infrastructure. Furthermore, a Belgian notary must be involved in the drafting of the statutes and establishment of the AISBL but it is very likely that he or she will not be familiar with the special characteristics and requirements of pan-European research infrastructures. Therefore, while the drafting of the statutes will always require careful consideration and the assistance of a person skilled in the art, it is likely that the preparation of the governing documents for the AISBL will require more effort and supervision in order to ensure that they fit for purpose and are tailored for a distributed research infrastructure such as DiSSCo.

Funding: the statutes of the ERIC require strong commitment by member countries, including long-term financial commitment in the form of contributions (cash and possibly in-kind).

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Often, the ERIC statutes will also limit the possibility of members to withdraw in the first five years or impose other forms of restrictions to ensure continuity. The establishment of the ERIC (and approval of its statutes) is done by way of EU Decision. A Decision is a legal act, binding on those to whom it is addressed i.e. the EU member states that are members of the ERIC. A Decision is directly applicable, meaning, it does not need any other acts of parliament in the member state to make it into law. This set up provides for a stronger commitment by the members (governments) and national funding agencies and once established, the ERIC is likely to have a stronger long-term financial stability when compared to the AISBL.

8. Recommendations

The analysis above suggests that while both the AISBL and ERIC are suitable long-term legal entities for DiSSCo, the ERIC is preferable over the AISBL as it is a more tailored legal entity for distributed research infrastructures such as DiSSCo. Assuming that the support by governmental representatives is secured, the only significant weakness of the ERIC alternative is that direct membership by participating institutions, in particular CETAF, is not possible. A number of mitigation steps could be implemented in order to grant CETAF certain rights (and obligations) including the possibility to attend the meetings of the General Assembly and have a say in the decision-making process. Such mitigation steps should be further considered and could potentially provide sufficient comfort to all parties concerned.

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