

OPINION
ON THE MOST BENEFICIAL LEGAL FORM
FOR A SCIENTIFIC UNIT THAT WILL BENEFIT
FROM FUNDING UNDER THE TEAMING OF EXCELLENCE
PROGRAMME
WITHIN HORIZON 2020

1. Requirements for the scientific unit that will realise the International Research Agenda (IRA) programme

Acting upon the order by the Foundation for Polish Science with its seat in Warsaw, having familiarised myself with the document "Programme: "International Research Agenda" submitted for this purpose and the legislation of the European Union available online pertaining to the said Programme (cf. The Official Journal of the EU C, No. 361 of December 11, 2013, p. 9) I hereby present the following opinion on the subject specified in the title hereinabove.

Pursuant to the Document, International Research Agendas are an operation consisting in the financing of international programmes created in co-operation between a scientific unit in Poland and a foreign institution of supreme academic position *within a separate structure with a legal personality that meets specific competition requirements*, (p. 1), provided that *the research unit realising an IRA* should:

- be *newly established* (p. 2), which can be understood as establishing such unit for the purposes of the realisation of IRA;
- have an international science board composed of at least 9 members, including at least 60% of researchers permanently employed abroad and at least two representatives of the foreign strategic partner (p. 2);
- have a legal form that enables (p. 2):
 - granting a wide scope of competence to the said international science board (the minimum competences are defined as: representing the IRA in external contacts – which is difficult to be evaluated in the legal aspect, because, as already suggested in the name, the Board cannot be a managing body as defined in Art. 41 of the Polish Civil Code, and, generally, it is the managing body that is responsible for representing the given legal entity in external contacts; announcing competitions for independent positions in the

IRA; evaluation and selection of research leaders; periodical evaluation of each leader and of the IRA as a whole; defining the needs connected with the development of the conducted research or changes in the adopted research agenda);

- ensuring the freedom of research for researchers;

- transparent recruitment and success criteria;

- entering into partnerships with Polish institutions that possess the adequate infrastructure, human resources and critical mass with respect to the scope of the activity of the IRA;

- have a statute (which, in the light of Art. 35 and 38 of the Polish Civil Code is obvious with respect to all legal entities in Poland, except for the State Treasury), but also the rules and regulations of the work of the international science board (p. 4);

- have an administrative and legal structure strictly aligned with the scientific and economic objectives (p. 5).

2. Legal forms of a unit realising the IRA pursuant to the document "Programme: International Research Agendas"

The Document states that "the most beneficial legal form might be *an inter-institutional unit or joint unit as specified in Art. 31a of the Act – Law on Higher Education*, established basing on an agreement between a Polish higher education institution and at least one foreign partner who would be the strategic partner. Other legal forms are also permissible, provided that they should carry out continuous research and have the possibility to ensure the durability of operations and meet the requirements with respect to the competences of the science board and the principles of recruitment for independent research leader positions. Thus, the possible forms also include *companies and foundations or other entities* that meet the above requirements, also including *inter-institutional units* established as a result of co-operation between higher education institutions and other national scientific units. However, it is essential for such unit to enjoy significant autonomy based on scientific competitiveness unrestricted by the regulations of the given higher education institution or local customs".

3. The difficulty of application of the preferred form – unit established pursuant to Art. 31a of the Act – Law on Higher Education.

The preferred forms listed in the Document: inter-institutional unit or joint unit established together with a foreign partner pursuant to Art. 31a of the Act – Law on Higher Education do not possess legal personality. In Poland, the adopted concept of legal personality is based on so-called normative structure, which requires *statutory* determination whether the given entity or category of entities has legal personality.

If the requirement to possess legal personality is an essential condition for considering the given structure an IRA unit, then the discussed categories cannot be taken into account within the scope of this opinion, as there is no existing legislation that would grant them legal personality.

The need to have legal personality is explained – apart from the fact that, as one may believe, they should be scientific units as defined in the Act on the Principles of Financing Science of April 30, 2010 (Journal of Laws, No. 96, item 615, incl. further amendments), and these units, pursuant to the definition in Art. 2 item 9 letter f of the said Act, should have legal personality (apart from basic organisational units of higher education institutions) – the need for a clear civil law status of the relevant unit, which, according to the Document will be "entering into partnerships with Polish institutions that possess the adequate infrastructure, human resources and critical mass with respect to the scope of the activity of the IRA".

Although in 2003 a new category was introduced in the Polish Civil Code, to which the provisions on legal entities are applied, defined in the doctrine as "a legal entity without corporate status" – pursuant to the wording of Art. 33¹ §1 it is "such organizational unit not being legal person which have been granted the legal capacity by virtue of statutory law" – but the Act – Law on Higher Education does not *explicitly* grant such capacity to units created pursuant to Art. 31 a. Moreover, the use of the term "agreement" in the Act with respect to the basis of creating such unit, which demonstrates that, it actually refers to a form of co-operation between the parties, not to the creation of a wholly new legal entity can hardly be considered as random – the term "agreement" is used in the preceding article (Art. 31) of the Act – Law on Higher Education, concerning the establishing of research centres, including in co-operation with foreign scientific units; however, such research centres do not have legal personality, either, nor is there an explicit statement about the possession of such legal personality. In fact, the lack of "legal personality without corporate status" means that the relevant legal actions are not performed by the given organisational unit but by one of the parties to the agreement, specified therein, and, if none is specified, both parties, pursuant to binding legal regulations, i.e. based on the registered seat of the unit and the place of conducting activity,

regulations of Polish law, starting from the provisions of the Law on Higher education to the extent to which they are applicable.

Even if it were assumed that the Act – Law on Higher Education *implicitly* grants such legal capacity to units created pursuant to Art. 31a of the Law, in the absence of any other statutory regulations, the provisions of Art. 33¹ § 2 apply to such unit. Pursuant to these provisions, the members (in this case the Polish higher education institution and the foreign partner) bear subsidiary liability for obligations of the unit; the said liability shall arise when such an organizational unit becomes insolvent. It seems unlikely that major foreign institutions, such as those listed in the Document (p. 2) as foreign strategic partners would be willing to embrace such liability.

One may assume that the fact that the form of inter-institutional unit or joint unit established together with a foreign partner pursuant to Art. 31a of the Act – Law on Higher Education is preferred in the Document, results from the belief that it is possible to include in the agreement between Polish higher education institution and the foreign institution referred to in item 3 of the quoted article the provisions that would enable such unit to meet all other listed criteria for a scientific unit realising the IRA.

On the other hand, it seems impossible for such unit, even more if it is financed or co-financed by a Polish higher education institution (it is required to determine the manner of financing of the unit in the agreement), whether it is considered a "legal entity without corporate status" or not – to have significant autonomy based on scientific competitiveness *unrestricted by the regulations of the given higher education institution*. This results from the fact that the given higher education institution always has to comply with its own internal regulations, which have to be compliant with generally binding regulations, as well as with the latter regulations. This has been indirectly noted in the Document, as it contains a statement which means that the team leader will have the status of an academic lecturer ("Employment at the IRA will be the only work place of the team leader and his/her contractual *teaching load* should not exceed 90 hours per year" – p. 4).

The unit operating pursuant to Art. 31a of the Law on Higher Education cannot function in a legal void, that will be filled at the discretion of the parties to the agreement, but, as a Polish law entity (although, as it has been already mentioned, of a doubtful legal personality "without corporate status") it has to meet all the requirements under this law. On the other hand, the partner is obliged to take into account also the provisions of the binding law for its registered seat, starting from the negotiations on the wording of the agreement.

Consequently, the form of inter-institutional unit or joint unit established together with a foreign partner pursuant to Art. 31a of the Law on Higher Education preferred in the Document should be considered as unjustified, because it is doubtful whether such form can even be applied at all, if one intends to meet all the requirements specified in the Document.

The above remarks may also be applied to (also stated in the Document), the form of inter-institutional unit or joint unit established by a Polish higher education institution with a Polish scientific partner – also pursuant to Art. 31a and to the form of a research centre already mentioned hereinabove (and not mentioned in the Document), established pursuant to 31 of the Act – Law on Higher Education.

4. Possibilities to apply the form of a company

The Document also points out the possibility to use the form of a company for the discussed purpose – i.e. a company established by a Polish scientific unit, as it may be believed, with only potential participation of relevant Polish or foreign partners.

If we consider the possession of legal personality as a significant feature of the unit realising IRA, only one of two forms of capital company may be applied: limited liability or joint stock company. Pursuant to the Code of Commercial Companies, both these forms may be established by an only partner/stockholder.

On the other hand, the possibility to establish companies and to hold shares or stocks in such companies is significantly limited with respect to the subject of the present opinion.

Namely, pursuant to Art. 49, item 1 of the Act of the August 27, 2009 on Public Finance (Journal of Laws of 2013, item 885 incl. further amendments), entities that were devoid of such possibility (in the future, but also with respect to already possessed rights, pursuant to Art. 104 of the Act of August 27, 2009 – Regulations implementing the Act on Public Finance, Journal of Laws of Laws, No. 157, item 1241) are entities from the public finance sector, apart from territorial self-government units – unless separate legislation states otherwise. Entities of the public finance sector include, in particular, public higher education institutions and organisational units of the Polish Academy of

Sciences, while research institutes, also those belonging to main scientific institutions, are not entities of the public finance sector (Art. 9, items 11, 12 and 14 of the quoted Act on Public Finance).

With respect to entities being public finance sector entities that may be included in the scope of this opinion, the said separate legislation, with respect to public higher education institutions, is: Art. 86, item 1 and Art. 86a of the Law on Higher Education. It authorises public higher education institutions only to create academic business incubators, with the aim of supporting the economic activity of the academic community or staff or students who are entrepreneurs and to create technology transfer centres, with a view to trading research and development findings or transferring same to the economy without charge (Art. 86) as well as special purpose vehicles (Art. 86a) whose mission is the commercialisation of research and development findings, which may also include the management of industrial property laws of the higher education institution with respect to such commercialisation. It should be added that the government draft of the amendment of the Act, which is currently considered by the Sejm, foresees the separation of the aims of technology transfer centres and special purpose vehicles and abandoning the possibility to use the form of company by technology transfer centres.

There are no similar regulations with respect to organisational units (i.e. institutes) of the Polish Academy of Sciences, which, in the light of the Act on Polish Academy of Sciences of April 30, 2010, (Journal of Laws No. 96, item 619 incl. further amendments), may only establish Academy centres (which may also include higher education institutions, research institutes, entrepreneurs who engage in research and development work, and foreign scientific institutions – Art. 57 of the said Act), international institutes with foreign institutions or organisations (Art. 58) or joint institutes with public higher education institutions or with other scientific units (Art. 59); among the listed units only international institutes have legal personality (argument pursuant to Art. 58, item 3, in connection with the normative concept of legal personality mentioned hereinabove). Thus, on the one hand, in general all the requirements set for a unit realising IRA can be potentially met only by an international institute (although it seems quite unlikely that it will be established by the Academy for the discussed purpose), on the other hand - institutes of the Polish Academy of Sciences cannot establish any companies, including for the purposes of realisation of IRA.

In turn, the provisions of the Act of April 30, 2010 on Research Institutes (Journal of Laws No. 96, item 618 incl. further amendments), are formulated in such a way that – although, as it has been already mentioned, research institutes

are not subject to the prohibition resulting from Art. 49, item 1 of the Act on Public Finance – they cannot establish or enter into companies with a purpose, only within the scope of the research and development works carried out by the institute, other than to commercialise the outcome of research and development work, carry out activities related to a transfer of technologies and knowledge dissemination as well as to raise funds for its activities specified in the Statutes. The consent of the supervising Minister is always required, as any legal transactions entered into in breach of these provisions shall be void (Art. 17, item 5-8 of the Act on Research Institutes).

Thus, the form of company cannot be applied in practice with respect to the fundamental categories of Polish scientific units interested in the realisation of IRA.

5. Possibilities to apply the form of a foundation

A foundation has legal personality and its objectives under the statute may doubtlessly include carrying out or supporting scientific research (Art. 1 of the Act – Law on Foundations of April 6, 1984 – Journal of Laws of 1991, No. 46, item 203, incl. further amendments, which generally outlines the objective as advancement of science), although the Act on Public Finance excludes (Art. 45) the possibility to establish foundations by public finance sector entities, due to the prohibition to establish foundations from public funds pursuant to the regulations.

This excludes the possibility of direct application of this legal form both by public higher education institutions (apart from creating academic business incubators and technology transfer centres, although the latter category will likely be excluded pursuant to the government project of amendment to the Act – Law on Higher education) and institutes of the Polish Academy of Sciences. On the other hand, research institutes are not deprived of such possibility – provided that they not use the obtained public funding for this purpose and provided that any contribution of property classified as tangible fixed asset of a value exceeding EUR 20.000 by the institute to the foundation requires the consent of the Supervising Minister (Art. 17, item 3, point 1 of the quoted Act on Research Institutes).

It should be pointed out here that the Act – Law on Foundations does not foresee any minimum value (unless the declaration of payment of PLN 1 is considered the minimum) of the equipment of the newly established foundation by its founder (apart from the need to provide the foundation with property elements required for the realisation of its objectives) - except, as it results from

the adopted interpretation of its provisions, for the situation where the foundation is established with a predefined intention to conduct business activity (then the value of equipment must exceed PLN 2.000, as the minimum amount of funds for business activity stipulated in the Act is PLN 1.000). At the same time, one might believe that, although the fragment of the Document quoted hereinabove states the need to subordinate the structure of the unit to scientific and economic purposes, there are no clear reasons why a foundation established for the purposes of IRA would have to conduct business activity, at least initially.

However, the statutory exclusion of the possibility to establish foundations by public higher education institutions and institutes of the Polish Academy of Sciences does not mean a complete absence of possibilities to use this legal form for the purposes of IRA by these entities, as, in the light of the quoted Act on Foundations, the legal form of a foundation is flexible enough to be applied for the discussed purpose.

Namely, bearing in mind that the foundation can be established also for the purposes of the realisation of IRA, the practice of application of the Act proves that it is possible to separate the establishing of the foundation by one or more founders (being natural or legal persons of any citizenship and registered seat) from the exercising of rights that will be granted to parties specified in the statute, including third parties, pursuant to the statute, generally agreed on by the founders.

A prime example may be the Foundation of the Warsaw University, although it does not conduct scientific research but supports it. It was established in 1988 by a natural person – the Rector, who, due to factual reasons, could not act as a representative of the University, the founder did not exercise his right (which is usually exercised) to grant himself any authorisations in the statute of the Foundation after registering it, entrusting all major competences (appointing and removal of the Board and Revision Committee, discharging members of these bodies, approving financial statements and general statements, introducing changes to the statute) to the Senate of the Warsaw University instead.

As a result, it is possible for a foundation that will become a unit realising IRA to be established by one or more natural persons or legal entities (obviously unrestricted in this respect), provided that they should act in close co-operation both with the relevant Polish scientific unit that would be the leading partner with respect to the IRA and with the foreign partner. It seems that the optimal form of agreement would be a tri-lateral agreement on the foundation, entered

into between the Polish scientific unit, the foreign partner and the (future at that time) founder or group of founders.

In such situation, the statute of the foundation drawn up by the founder(s) may contain – as there are no legal limitations here – provisions that will guarantee the fulfilment of all requirements contained in the Document, in particular those concerning:

- the composition and competences of the international science board that could at the same time act as the board of the foundation, with similar competences as the Senate of the Warsaw University has towards the Foundation of the Warsaw University, additionally extended by the right to determine the organisational structure of the foundation (although one might also consider the appointment of a science board independent from the international science board; in such case the board of the foundation would be composed of representatives of the Polish leading scientific unit and the foreign partner);
- regulations of work of the international science board – it would be recommended to determine such regulations for the management board and, if defined, for the board of the foundation, in a way specified in the statute;
- independence of the foundation in the shaping of employment relations – provided that transparent recruitment and success criteria are ensured along with the determination of the necessary competences of the international science board;
- ensuring the freedom of research for researchers;
- entering into partnerships with Polish institutions that possess the adequate infrastructure, human resources and critical mass including, in particular, the leading scientific unit.

The above demonstrates that, from the legal point of view, four elements are essential for the proper application of the form of foundation for the discussed purposes:

- appropriate selection of founder(s) that will ensure the realisation of the whole scenario resulting in obtaining IRA status;
- preparation of an appropriate agreement or agreements prior to the establishing of the foundation;
- preparation of an appropriate draft statute of the foundation that could constitute an appendix to the potential tri-lateral agreement of the interested parties;

- preparation of other documents (deeds of appointment of members of the bodies, regulations of the work of such bodies, organisational structure of the foundation) that may also constitute appendices to the agreement;
- concluding the process of entering into agreement(s), which will then constitute the basis for the formalisation of the legal existence of the foundation by concluding the instrument establishing the foundation by the founder(s), and, after the completion of further actions, including in particular the formal determination of the statute by the founder and the appointment of the first governing bodies of the foundation in the manner set forth in the statute, registering the foundation in the National Court Register (the application shall be filed by the board of the foundation or by all founders).

6. Conclusions

Basing on the assumption that a unit newly created for the purposes of the IRA should have a legal personality the current legislation significantly limits the possibilities of Polish scientific units that are directly interested in the participation in the Programme to select a legal form that would be suitable for them and, at the same time, meet all other requirements set for IRAs.

Among the forms that have a legal personality, neither public universities, nor institutes of the Polish Academy of Sciences, nor research institutions can use the form of a capital company in practice.

While research institutions have the possibility to apply the form of foundation directly, as founders (although they cannot establish foundations from the public funds granted to them), public universities and institutes of the Polish Academy of Sciences (the latter based on the assumption that the Academy will not create an international research institution for that purpose) are practically deprived of the possibility to apply any legal form directly, although the statutory extent of possibilities to establish institutions for research co-operation is apparently quite wide. Thus, the only way for them is to use the form of foundation, established by a formally separate founder, but under an agreement, and with a foreign partner who is indispensable for the functioning of an IRA, at the same time ensuring the proper authorisation to the parties of such agreement.

Such indirect application of the form of foundation would seem a proper solution also if it is confirmed that the unit realising an IRA does not have to have a legal form and if it is considered for public universities to use the forms

specified in Art. 31a of the Law on Higher Education, which results from the lack of a practical possibility to fully meet the other requirements specified in the Document "Programme: International Research Agenda".

Prof. dr hab. Hubert Izdebski
legal counsel, attorney at law

Please note that this translation is for convenience only. The Polish version of this document is binding.