

OPINION

REGARDING SPECIFIC ASPECTS OF THE FUNCTIONING OF ENTITIES THAT REALISE THE INTERNATIONAL RESEARCH AGENDA (IRA) PROGRAMME

With respect to the order of April 17th, placed by the Foundation for Polish Science (Fundacja na Rzecz Nauki Polskiej, FNP), I hereby present the following opinion on the matter generally outlined in the title hereof. The definition refers to the issue specified in the order as the analysis and opinion regarding whether:

- 1) *newly established entities realising the International Research Agendas (hereinafter referred to as IRAs), established in the legal forms considered by FNP: foundation, joint or inter-institutional unit, international institute of the Polish Academy of Sciences (PAN) or company, will meet the requirements for a research entity in the light of the Act on the Principles of Financing Science starting from the moment of establishing;*
- 2) *Whether it is possible, in view of currently binding legal regulations, to establish an inter-institutional unit or a joint unit as defined in Art. 31a of the Act – Law on Higher Education, established based on an agreement between a Polish academic institution and at least one foreign partner, that would meet the requirements set for IRAs by FNP, including but not limited to:*
 - a) *Whether it is possible to ensure that the unit will meet the requirements set by FNP for future IRAs? Which regulations should be included in the international agreement, and which ones cannot be effectively ensured by such instrument?*
 - b) *What would be the scope of autonomy of such unit: which of the prerequisites for the functioning of IRA could be guaranteed and how?*
 - c) *How to effectively ensure the fulfilment of the conditions for the recruitment of research team leaders conducted by an international scientific committee?*
 - d) *Who would be the employer for scientists conducting research within an IRA?*
 - e) *In what manner and on what terms would such scientists be employed?*
 - f) *Who would shape the remunerations for IRA employees and how? Are there any limitations with respect to that?*
 - g) *Is it possible to ensure periodical evaluation of research team leaders on the conditions stipulated by FNP and how? Is it possible to prolong the leader's contract for a definite period of time more than once if the result of the evaluation is positive?*
 - h) *How to guarantee the durability of such unit in an efficient way?*
 - i) *Which requirements set by FNP for IRAs cannot be guaranteed to be fulfilled within an inter-institutional unit or a joint unit?*
- 3) *Whether it is possible, in the light of currently binding legal regulations, to establish an international institution with foreign institutions or organisations, pursuant to Art.*

58 of the Act of April 30, 2010 on the Polish Academy of Sciences, that would meet the requirements set by FNP for IRAs; here we would like to ask you in particular to consider all the doubts listed in points a) to i) hereinabove, taking into account the context of the prerequisites and the specifics of the Act on the Polish Academy of Sciences;

- 4) *Whether it is possible, in the light of currently binding regulations, to establish an IRA in form of a limited liability company while maintaining the requirements set by FNP, and, if possible, on what conditions, in particular:*
- a) *how to guarantee the stability and durability of such company both during and after the period of financing by FNP? Could durability be provided by an agreement between the company established in Poland in order to realise the IRA and a foreign institution for a period extending the period of financing the IRA by FNP? Can such an agreement determine the manner of recruiting employees?*
 - b) *What legal form would cover the functions that would be analogical to those of the Committee (as in the Objectives)? Please also consider the special case, which is a company wholly owned by a public academic institution.*
 - c) *Is it possible for FNP to hold a share in the ownership of an IRA Limited Liability Company in order to ensure the stability of such entity?*

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Before attempting to provide the answers to the above questions, I believe that it is justified to recall the fundamental initial objectives of my opinion of May 9th, 2014 on the most beneficial legal form for a research unit that would benefit from the financing under the *Teaming of Excellence* programme under Horizon 2020, prepared based on the document "International Research Agenda Programme" (hereinafter referred to as the "Document") and the legislation of the European Union available online pertaining to the said Programme (cf. Official Journal of the EU C, No. 361 of December 11, 2013, p. 9).

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

- be *newly created*, 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;
- have a legal form that enables:
 - 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 evaluate in the legal aspect, 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 works of the international science board;
 - have an administrative and legal structure strictly aligned with the scientific and economic objectives.

In the quoted opinion I stated that – based on the assumption that a unit newly established for the purposes of the IRA should have a legal personality – the existing legislation as of the date of the opinion significantly limited 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 higher education institutions, nor institutes of the Polish Academy of Sciences, nor research institutes could use the form of a capital company in practice. While research institutes had the possibility to directly apply the form of foundation as founders (although they could not establish foundations from public funds granted to them), public higher education institutions 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) were practically deprived of the possibility to apply any legal form directly, although the statutory extent of possibilities to create institutions for research co-operation was apparently quite wide. Thus, the only way for them was to use the form of foundation, established by a formally separate founder, but under an agreement with them 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 also a proper solution if it was confirmed that the unit realising an IRA did not have to have a legal form and if the use of forms specified in Art. 31a of the Act – Law on Higher Education was considered. This is due to the lack of a practical possibility to fully meet the other requirements specified in the Document in such case.

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After the preparation of the quoted opinion, until now, regardless of certain changes with respect to the Document resulting from the shorter document "International Research Agendas" submitted by the Ordering Party (which, generally, mitigated the former restrictions, and consisted in introducing the name "International Science *Committee*" - in international research institutions such Committee should employ at least half of the members, and be composed of representatives of the applicants and the Polish and foreign partner or persons recommended by them. The tasks of such Committee include the preparation of the research agenda, i.e. a research and development programme realised at the IRA, verification of the said agenda, announcing and conducting the competition for the position of Director or President of the IRA as well as periodical evaluation of research team leaders, while the preferred legal form is specified as a foundation), some changes in legislation were introduced, which may be of significance for the subject of the present

opinion.

Apart from the changes that were announced in the quoted opinion of May 9, 2014, introduced by the Act of July 11, 2014 amending the Act – Law on Higher Education and certain other Acts (Journal of Laws, item 1198), but not referring directly to the regulations quoted in the order, one should first of all point to the changes introduced by the Act of January 15, 2015 amending the Act on Financing Science and certain Acts (Journal of Laws, item 249) that enters into force on the May 25. In particular, the Act amends Art. 2 item 9, letter f of the Act on the Principles of Financing Science containing the definition of a scientific unit.

The former definition of scientific units other than basic organisational units of higher education institutions, scientific units of the Polish Academy of Sciences, research institutes, international scientific institutes and the Polish Academy of Sciences; *(other organisational units [conducting continuous scientific research or development works] which are legal persons and have registered offices in the Republic of Poland, including entrepreneurs with a status of a research and development centre granted pursuant to the Act of 30 May 2008 on Certain Forms of Support for Innovative Activities)* will be replaced by a new definition: *other organisational units [...][that have registered offices in the Republic of Poland, being research and knowledge dissemination organisations pursuant to Art. 2 item 83 of the Regulation of the Commission (EU) of June 17, 2014, declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty).*

The quoted provision of the Commission Regulation is as follows: *an entity (such as universities or research institutes, technology transfer agencies, innovation intermediaries, research-oriented physical or virtual collaborative entities), irrespective of its legal status (organised under public or private law) or way of financing, whose primary goal is to independently conduct fundamental research, industrial research or experimental development or to widely disseminate the results of such activities by way of teaching, publication or knowledge transfer. Where such entity also pursues economic activities the financing, the costs and the revenues of those economic activities must be accounted for separately. Enterprises that can exert a decisive influence upon such an entity, in the quality of, for example, shareholders or members, may not enjoy preferential access to the results generated by it.*

Although the definition quoted hereinabove is of a very general nature, the reference contained in the amended Act on the Principles of Financing Science, where the requirement to have a legal personality is not stipulated anymore, one may claim that, starting from May 25, a scientific unit does not have to possess legal personality. Neither can one claim that – if it is considered as an organisational unit (which seems to be implied by the term "research and knowledge dissemination organisation") – it has to be "a legal entity without corporate status" in the meaning discussed in the quoted opinion of May 9, 2014.

One can believe that it is mainly the discussed amendment that may influence the content of the present opinion in the view of the previous opinion of May 9, 2014.

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This refers, first of all, to the answer to **question (1)** of the Order, as, with respect to the upcoming legal circumstances, it may be considered whether it will be possible to consider scientific units not only as specified entities having legal personality, but also as joint and inter-institutional units established pursuant to Art. 31a of the Act – Law on Higher Education.

Pursuant to the opinion of May 9, 2014, the term "legal entity without corporate

status", as defined in the provisions of Art. 33¹ § 1 of the Polish Civil Code, refers to "organizational units not being legal persons which have been granted the legal capacity by virtue of statutory law". The Act – Law on Higher Education does not *explicitly* grant such capacity to units created pursuant to Art. 31a. Moreover, it uses the term "agreement" 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. However, it is doubtless that the use of the term "unit" in the Act refers to the organisational separation of such unit, and thus, even more considering that Art. 31a does not limit the tasks of such unit to conducting studies and other forms of education, although such tasks can be considered as preferred, it may correspond to the new definition of a scientific unit, in particular if it is established for the purposes of the realisation of an IRA programme.

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With respect to **question (2)** of the Order, on the basis of the upcoming legal situation, it will be possible to claim (at the same time noting that the new document on IRA does not contain a requirement to have legal personality) that it is generally acceptable to create an inter-institutional unit or joint unit pursuant to Art. 31a of the Act – Law on Higher Education, established based on an agreement between a Polish higher education institution and at least one foreign partner that would meet the requirements set for IRAs by FNP.

However, this would depend on the content of the agreement, and one should remember that it is governed not only by Polish law but also by the law of the foreign partner, so it may also depend on the provisions of such law (which, obviously, cannot be discussed in purely abstract terms).

In the light of Polish law, i.e. in particular of the Act – Law on Higher Education as amended by the quoted Act of 2014, such entity that does not have legal personality, nor legal personality without corporate status, will be operating within a Polish academic institution, and it will employ employees of such institution, who are governed by relevant statutory and legislative regulations.

When analysing potential limitations of the possibility to ensure the fulfilment of IRA requirements in the agreement, one may claim that the current wording of the provisions of the Act – Law on Higher Education does not pose a significant barrier to such regulation of the organisational agreement, the way of functioning and financing of the unit (Art. 31a, item 3 of the Act) to make such realisation generally impossible.

This refers to the status of employees – provided that they shall formally be employed by the Rector, in such positions and based on such qualifications as stipulated in the Act, and, if higher qualification requirements are foreseen, it has to be reflected in the statute of the university (Art. 116, item 1 of the Act – Law on Higher Education); the relevant detailed provisions concerning competitions for all positions also have to be included in the statute (Art. 118 a, item 1), while the competition for the Director/President and research team leaders (if it concerned those already employed) might generally be organised based only on the principles and in the way set forth in the agreement itself (unless the statute foresees special principles and manner for the organisation of competition for this type of managerial positions); moreover, the statute of the higher education institution has to take into account the special principles and manner of the periodical evaluation of research team leaders (Art. 132, item 2 of the Act), containing at least a reference to the agreement in question.

Due to the above, the realisation of the fulfilment of the IRA requirements would be guaranteed simultaneously by the agreement and by the statute of the higher education institution.

As these documents would not be formally independent from each other, one might imagine that the statute that had earlier considered the IRA requirements (mainly by means of reference to the agreement), might be modified in such a way that would mean the lack of such consideration later on.

The only legal obstacle preventing such modification might be the appropriate obligations of the higher education institution towards its partner(s) contained in the agreement, which might also be threatened by actual sanctions (e.g. contractual penalties).

This would also be the only way to legally ensure the durability of such unit – obviously, only for the period of the agreement, because in the event of expiry of such agreement there are no available legal instruments that would guarantee the durability of a unit created pursuant to such agreement.

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The answer to **question (3)** of the Order would be generally similar, although not identical. The said question concerns the possibility, in the light of currently binding legal regulations, to establish an international institution with foreign scientific institutions or organisations, pursuant to Art. 58 of the Act of April 30, 2010 on the Polish Academy of Sciences, that would meet the requirements set for IRAs by FNP.

It is necessary to emphasise that the international institute, established pursuant to an agreement with international scientific institutions or organisations (where the statute would be an integral part of the agreement), would be an institute of the Academy, i.e. on the one hand it would definitely possess legal personality, while on the other hand it would have to meet the requirements defined for institutes of the Academy in the Act on the Polish Academy of Sciences. Only international institutes established pursuant to separate legislation do not have to meet these requirements. Such institute is the International Institute of Molecular and Cell Biology in Warsaw (Act of June 26, 1997, Journal of Laws, No. 106, item 674, resulting from the agreement between the Government of the Republic of Poland and UNESCO, which foresees, among others, a specific form, with an International Advisory Committee instead of the Science Board and a different system of positions: professor-researcher-assistant, but also the supervision by the President of the Polish Academy of Sciences).

As a result, an international research institute established pursuant to Art. 58 of the Act on the Polish Academy of Sciences, if based on the provisions of item 3 in connection with items 1 and 2, should, in the light of Polish law (obviously, the partner's law cannot be discussed), in particular be established upon the consent of the Minister of Science and Higher Education (Art. 44 of the Act), obtain suitable equipment from the Academy (Art. 45), be supervised by the President of the Academy and should not have a statute that would contain solutions significantly non-compliant with the Act (thus, one may have certain doubts whether Art. 58 contains an authorisation to replace the Science Board wholly or partly by an International Committee – in my opinion this is possible, however, basic statutory competences of the science board should be maintained, although without adopting a statute, and, even more, one may doubt whether more than 30% of the board-Committee members can be "external"). As far as the competition for the director is concerned (Art. 53 of the Act), the regulation of the Minister issued pursuant to Art. 53 should contain at least a reference to the agreement and the statute of the institute. Researchers would be governed by the provisions of Art. 89 and subsequent articles of the Act, although provided that there would be no major difficulties in the fulfilment of IRA requirements with respect to the determination of the principles and manner of the organisation of the competition, if these tasks of the Board could be performed by the Committee.

Due to the above, while the statute of the higher education institution is fundamental for the realisation of the IRA objectives in case of the units created pursuant to Art. 31a of the Act – Law on Higher Education, with respect to research institutes established pursuant to Art. 58 of the Act on the Polish Academy of Sciences, fewer difficulties may be attributed to statute regulations (as the statute in question is that of a newly established unit as set forth in the agreement), and a special role should be assigned to the "pro-IRA" interpretation of statutory provisions and to the changes (which in my opinion are necessary) of the regulation issued pursuant to Art. 58 of the Act.

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As far as the establishment of IRA in form of a limited liability company is concerned, (**question (4)** of the Order), it would be possible to partially repeat, considering certain changes in the existing legal situation, the findings contained in the quoted opinion of May 9, 2014. The findings in question demonstrate (although based on the assumption that the institution has to have legal personality, and this assumption is now weaker than before) that the limited liability company is the only form that should be considered, due to the simplicity of such solution.

The claim that 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, remains valid. 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 deprived 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 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 in the light of the quoted Act on the Principles of Financing Science.

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, are: Art. 86, item 1 and Art. 86a of the Act – Law on Higher Education in the wording introduced by the amendment of 2014. These provisions directly authorise higher education institutions, including public higher education institutions, to create academic business incubators in form of capital companies, with the aim of supporting the economic activity of the academic community or staff or students who are entrepreneurs, but they also contain an implied (thus, doubtful) encouragement to create centres of technology transfer, aimed at direct commercialisation of research outcomes (Art. 86), as well as wholly owned “special-purpose vehicles” (Art. 86a) whose mission consists in indirect commercialisation (defined in Art. 2, item 1 point 36 as holding or acquisition of shares or stocks in companies for the purposes of implementation or preparation for implementation of the results of scientific research, development works or know-how connected with these results), and which may also include the management of industrial property laws of the higher education institution with respect to such commercialisation.

As a result, which is also a part of the answer to question (4) of the Order, a company wholly owned by a higher education institution cannot realise the IRA programme independently, and the Act does not foresee even an indirect role in conducting scientific research through companies in which it may hold stocks or shares, as the tasks of such companies have been enumerated in Art. 86a of the Act – Law on Higher Education.

However, no similar regulations exist with respect to organisational units (i.e. institutes) of the Polish Academy of Sciences, which, in the light of the Act of April 30, 2010 on the Polish Academy of Sciences, may only establish Academy centres (which may also include research institutes, relevant entrepreneurs and foreign scientific institutions – art. 57 of the said Act), international institutes with foreign scientific institutions or organisations (Art. 58) or joint institutes with public higher education institutions or with other scientific units (Art. 59). Thus, institutes of the Polish Academy of Sciences are not permitted to establish any companies, including companies established for the purposes of realisation of the IRA.

On the other hand, the provisions of the Act of 30 April 2010 on Research Institutes are formulated in such a way that prevents research institutes, although they are not governed by the provisions of Art. 49, item 1 of the Act on Public Finance, from establishing and entering 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 dissemination of science, as well as to raise funds for its activities specified in the Statutes, provided that the consent of the supervising Minister is obtained, 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 claim that the form of a company cannot be applied in practice with respect to the fundamental categories of Polish scientific institutions interested in the realisation of IRA remains valid.

However, such company could be established, including with a foreign partner (if the partner expresses the will to do so) by the Foundation for Polish Science, which has also been mentioned in question (4) of the Order. It should be emphasised here that the Statute of FNP (uniform text of October 3, 2014) does not contain provisions that would directly foresee the possibility to establish companies or to participate in companies by the Foundation, and does not exclude such possibility indirectly. Moreover, in the light of existing legislation, holding shares in capital companies does not constitute conducting economic activity (which is expressly excluded by the Statute), and Art. 36 of the Civil Code that set forth so-called special legal capacity of legal entities, which stated that such capacity depended on the content of the legislation and statute, was repealed in 1990.

Due to the above, certain specific issues presented in the specific questions in question (4) may arise, which may be answered as follows (considering that the issue contained in the question regarding companies wholly owned by higher education institutions has already been discussed):

- On the basis of the wording of the last specific question, FNP does not intend (and rightfully, in my opinion) to create wholly owned capital companies for the purposes of realisation of the IRA programme, and thus it will potentially establish such companies jointly with other entities (and § 2 item 2 point 3 of the Statute contains "participation in ventures in compliance with the statutory objectives of the Foundation");
- On the other hand, FNP is considering the possibilities to guarantee the stability and durability of an IRA unit both during and after the period of financing by FNP – including by an agreement between the company established in Poland in order to realise the IRA and a foreign institution for a period extending the period of financing the IRA by FNP,

- While the structure of the articles of association of such limited liability company makes it impossible to formulate the relevant guarantees and significantly hinders the possibility to introduce the specified standards concerning the International Science Committee (which would have to perform the function of the Supervisory Board, although this would still be easier than replacing the statutory Science Board in an international research institute), it is possible to introduce into the articles of association certain provisions regulating the manner of recruitment of the management and personnel;
- In view of the lack of possibilities to create guarantees in the articles of association of the company, they have to be found in other contractual instruments, both in the instrument specified in the question (articles of association of a company established with a foreign partner) and in the *shareholders agreement* preceding the conclusion of the articles of association, however formulated in such a way that would make it binding even after partial "consumption" by establishing the company, in particular by the introduction of easily applied sanctions for the violation of the accepted obligations (contractual penalties, and, in case of instruments in form of notarial deed, one may consider a voluntary enforcement clause, pursuant to Art. 777 of the Polish Civil Code.);
- One may imagine that financing by FNP would only take place in the event if appropriate provisions were included in the discussed agreements (articles of association, *shareholders agreement*, etc.).

Pursuant to the above, the use of the form of a capital company (in practice: limited liability company) in the discussed scope is possible, but it will require the systematic development of a consistent set of contractual instruments even to a greater extent than in the case of the form of foundation.

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