



Preparatory Phase for the pan-European  
Research Infrastructure DANUBIUS-RI  
“The International Centre for advanced  
studies on river-sea systems”

# Report on common procurement of equipment, goods and services

## Deliverable 3.6



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## 1. Executive summary

The DANUBIUS Preparatory Phase identified the European Research Infrastructure Consortia (ERIC) as the most suitable legal entity for DANUBIUS-RI.

DANUBIUS-ERIC will be a distributed research infrastructure with the central management forming part of the headquarters of DANUBIUS-ERIC but the DANUBIUS Components will be distributed, meaning they will be placed in the different member countries and will either have their own legal entity, or more likely, be owned or controlled by one or more DANUBIUS Partners.

In accordance with Article 7(3) of the ERIC Regulation, the DANUBIUS-ERIC will be recognised as an international organisation for the purpose of the EU public procurement directives, and it could follow its own procurement procedures instead of those that would have been applicable under Romanian law (implementing the directives). The position in relation to the DANUBIUS Partners is different, however, as the Partners have a separate legal entity and are not legally part of the ERIC. The DANUBIUS Partners will only be exempt from the procurement directives if, in accordance with article 9(1)(b) of the EU directive, they are obliged to award or organise their procurement in accordance with procurement procedures established by the ERIC, for example, if the members agree upon such an obligation in the Statutes.

The term common procurement implies a joint effort between the ERIC and the DANUBIUS Partners (making purchases which are intended for the Components). Since there is no one definition of the term “common procurement”, it could be understood to mean one or more of the following:

- Central procurement
- Joint procurement, or
- Coordinated procurement.

If the ERIC were to act as a central procurement body it may face both regulatory and administrative constraints: in order for the ERIC to act as a central purchasing body for the benefit of the DANUBIUS Partners (and DANUBIUS Components), it will have to follow the EU procurement directives, unless the ERIC members have agreed in the Statutes, to oblige the DANUBIUS Partners to award or organise their procurement in accordance with procurement procedures established by the ERIC. In addition, the ERIC, if acting as a central procurement body, will need to have the resources, capacity and capability required in order to handle issues such as logistics, insurance, administrative capacity as well as contract management capability and ability to handle potential disputes with suppliers.

The prospects for the ERIC to conduct joint procurement with the Partners seems remote, because it is unlikely that the DANUBIUS-ERIC headquarter will require for its own use the same type of equipment, services or works that are needed for the Components. However, this does not exclude the possibility for two or more DANUBIUS Partners to conduct joint procurement among themselves.

The simple form of “common procurement” is a coordinated procurement, which involves a joint effort in the preparation of common technical specifications for works or supply or services that will be procured by the Partners independently (or jointly by some of them), for the benefit of the Components. Under a coordinated procurement approach, DANUBIUS-ERIC and the Partners will work together to agree the technical specifications required for the various Components and possibly address and agree issues such as timing and costs, while each Partner will be left to conduct its own procurement process, or to conduct the procurement jointly with one or more other DANUBIUS Partners.

The members of DANUBIUS-ERIC will be required to decide which of the options is most appropriate for the DANUBIUS-ERIC going forward, and integrate relevant provisions in the Statutes, to the extent this is required.

## 2. Introduction

The International Centre for Advanced Studies on River-Sea Systems (DANUBIUS-RI) is a distributed research infrastructure bringing together world leading expertise and providing access to a range of river-sea systems, facilities and expertise, to provide a “one-stop shop” for knowledge exchange, access to harmonised data, a platform for interdisciplinary research, education and training and hence provide answers to questions regarding sustainable management and environmental protection of the river-sea continuum.

DANUBIUS-RI will be composed of the following Components:

- 1 Hub, located in Murighiol, in the Danube delta, Romania;
- 4 Nodes, i.e. facilities specialized in an Area of Expertise located in different countries;
- 12 Supersites, “natural laboratories” sites where monitoring equipment are implemented, located all over Europe;
- 1 Data Centre, located in Romania at the University of Galați;
- 1 distributed Technology Transfer Office (TTO), in each ERIC Member Countries;
- 1 e-learning office, located in Barcelona, Spain.

Deliverable D3.1, with the endorsement of the DANUBIUS-PP General Assembly at its second meeting in November 2017, has concluded that the most appropriate legal entity for the DANUBIUS-RI is the European Research Infrastructure Consortium (ERIC).

An ERIC will require all DANUBIUS Components, including the DANUBIUS Partners (the home organisations of the DANUBIUS Components), to be from countries that are members of DANUBIUS-ERIC. This does not, however, mean that the DANUBIUS Components or DANUBIUS Partners will be under the ownership of the ERIC legal entity. The Components will be “outside” the ERIC legal entity and remain under the ownership, or controlled by, the DANUBIUS Partners.

Central management will be provided by the Director General with an executive team, which will work from the headquarters of DANUBIUS-ERIC and will be based in the Hub.

The DANUBIUS-ERIC will therefore be a distributed research infrastructure with a “light” headquarter under the ERIC and with the DANUBIUS Components located in a number of European countries owned or controlled by DANUBIUS Partners.

### 3. The legal framework

#### 3.1 The EU public procurement regulatory framework

The public procurement directives<sup>1</sup> set out detailed rules on the procedural aspects of carrying out procurement activity by covered entities. The directives apply to the procurement activities carried out by “contracting authorities” defined as “the State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law”. The latter concept of “bodies governed by public law” includes entities influenced by the state, hence at risk of using their procurement activities as a tool to support national contractors (and thereby discriminate against contractors from other Member States). The concept of a “body governed by public law” is defined in the directives and in essence it relates to a separate legal entity that has been established in order to meet needs in the general interest, not having an industrial or commercial character and that is financed for the most part or controlled by the state or by another contracting authority.

The EU public procurement directive are implemented in the national laws by the EU Member States, conforming to the directives.

Given their composition, objectives, non-commercial character and financing sources, the DANUBIUS Partners fall within the scope of the procurement directive and would be subject to the detailed rules set out in their national laws (implementing the procurement directive) when performing their purchasing activity. This would in principle also apply to the future DANUBIUS-ERIC, however, the procurement directives provides for specific exemptions to contracts which the contracting authority is obliged to award or organise in accordance with procurement procedures of an international organisation. As will be further discussed below, ERICs are classified as “international organisations” for the purpose of the directive, meaning that the DANUBIUS-ERIC may benefit from a specific exemption from the EU directives on public procurement.

#### 3.2 The ERIC Regulation

The ERIC Regulation provides European research infrastructures with a separate legal entity with “the most extensive legal capacity” recognised in all EU Member States. According to the ERIC Regulation, ERICs should have as their principal task the establishment and operation of a research infrastructure on a non-economic basis, although they may carry out limited economic activities

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<sup>1</sup> The most relevant one is Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014, on public procurement and repealing directive 2004/18/EC, (2014) OJ L94/65.

provided that such economic activities are closely related to their principal task and that they do not jeopardise the achievement thereof.

Article 7(3) of the ERIC Regulation further provides that an “ERIC is an international organisation within the meaning of Article 15(c) of directive 2004/18/EC”. When the new procurement directive was adopted in 2014, Article 15(c) became Article 9(1)(b) of the new directive, which now provides that:

*“this directive shall not apply to public contracts and design contests which the contracting authority is obliged to award or organise in accordance with procurement procedures different from those laid down in this directive established by any of the following:*

*(...) an international organisation.”*

It follows, that if the DANUBIUS-ERIC adopts its own procurement procedures which are different from those laid down by the EU directive, then it will not be subject to the EU directives on procurement and could follow its own procurement rules.

The position in relation to the DANUBIUS Partners is different however, as the Partners have a separate legal entity. Further, and as explained in Deliverable 5.2., the Components of the ERIC will be under the control of the DANUBIUS Partners, which are subject to the EU directive on procurement and do not qualify as “international organisation”.

The DANUBIUS Partners will only be exempt from the procurement directives if, in accordance with article 9(1)(b) of the EU directive, they are “obliged to award or organise in accordance with procurement procedures different from those laid down in this directive established by” the ERIC. This will arguably be possible if the members of the ERIC agree in the ERIC Statutes that the DANUBIUS Partners will have to follow the ERIC procurement rules whenever they purchase goods and services which are for the exclusive use by the DANUBIUS Components for the purpose of fulfilling the objective and tasks of DANUBIUS-ERIC.

## 4. What is common procurement?

The term common procurement implies a joint effort between the ERIC and the Components (or the Partners acting on behalf of the Components), or between the Components and themselves, to procure goods, services or works.

Since there is no one definition of the term “common procurement”, it could be understood in more than one way, including (but not limited to):

- Central procurement
- Joint procurement, or
- Coordinated procurement.

### 4.1 Central Procurement

Central procurement refers to a situation whereby one entity - a central purchasing body, acquires goods or services intended for one or more contracting authorities, or that the central purchasing body awards contracts for works, goods or services intended for use by one or more contracting authorities. This may also include the award of framework agreements which are intended for one or more contracting authorities.

According to the EU procurement directives, EU member states may prescribe in their national law (implementing the EU directives) that contracting authorities may purchase works, supplies or services from or through central purchasing bodies, and by doing so, they do not need to run a new procurement process themselves.

Other than the fact that a central procurement body will reduce the administrative and related costs of running a number of parallel procurement procedures by a number of contracting authorities, the advantage of using a centralised procurement function is that large procurement volumes could reduce prices by achieving economies of scale as well as increase competition. Furthermore, they reduce duplication, transaction costs, and increase certainty, simplicity and uniformity, allowing for more focused delivery of the research infrastructure overall purchasing needs.

## **4.2 Joint procurement**

Joint procurement can vary in degree but for the purpose of this report, it refers to situations where a number of contracting authorities conduct one procurement procedure, on behalf of all participating authorities.

Joint procurement actions might be performed among contracting authorities within the same country or as cross-border joint procurement among contracting authorities from different countries.

A joint procurement procedure could be carried out “jointly”, with all relevant contracting authorities taking part and managing the procurement process together, or, it can be carried out by one contracting authority, on behalf of all others, so that only one contracting authority actually manages the procedure on its own behalf and on behalf of the other authorities.

In both cases all contracting authorities are jointly responsible for the procurement process, and also for fulfilling their legal obligations in the way they manage the procurement process.

## **4.3 Coordinated procurement**

Coordinated procurement refers to a lower level of joint procurement, whereby the joint effort is focused on the preparation of common technical specifications for works or supply or services that will be procured by a number of contracting authorities, but with each contracting authority conducting a separate procurement procedure for itself. Obviously, this would mean more than one procurement procedure (by more than one contracting authority) for same or similar items, but the result will be a more harmonised purchasing activity with similar or a coordinated use of equipment, works or services.

## 5. Advantages of common procurement

Depending on the degree of collaboration (varying from central procurement to coordinated procurement as explained above), common procurement has many advantages as it may deliver:

- Administrative benefits: lower administrative costs incurred for running a centralized procurement procedure. This is preferable to having a number of procedures managed by separate contracting authorities.
- Financial benefits: Lower tender prices might be expected due to economies of scale and the higher quantities purchased. Having a stronger purchasing power and procuring larger quantities, a number of contracting authorities acting together can have a strong impact on the level of competition and final prices.
- Competence in managing a procurement process: contracting authorities can benefit from each other's procurement expertise and competences. Moreover, they can pool resources together and have one central procurement team which is highly professional and acts for all relevant authorities (DANUBIUS Partners and Components). This could be particularly relevant when procuring innovation and R&D services.

Finally, centralised procurement reduces duplication, transaction costs, and increase certainty, simplicity and uniformity, allowing for more focused delivery of equipment and services needed.

## 6. Implications to DANUBIUS-ERIC

### 6.1 Central procurement

Central procurement by the DANUBIUS-ERIC intended for the Components or Partners will maximise the benefits explained in section 5 above. However, DANUBIUS-ERIC may face certain regulatory constraints: in order for the ERIC to act as a central purchasing body for the benefit of the DANUBIUS Partners (and DANUBIUS Components), it will have to follow the EU procurement directives, and not its own procurement rules. This is because the DANUBIUS Partners, who are subject to the EU directive on procurement, will only be able to rely on central purchasing activities carried out by another contracting authority that has conducted a procurement procedure that is compliant with the EU procurement rules.

This legal difficulty could, in principle, be avoided, if the ERIC members take upon themselves to oblige the DANUBIUS Partners to award or organise their procurement in accordance with procurement procedures different from those laid down in the directive, i.e., those established by the ERIC. This could be done, for example, by way of a specific agreement in the Statutes.

A possible clause in the Statutes could read as follows:

*“Purchases by the DANUBIUS Partners, which are for the exclusive use by the DANUBIUS Components for the purpose of fulfilling the objective and tasks of DANUBIUS-ERIC, shall be awarded and organised in accordance with the procurement rules of DANUBIUS-ERIC”*

Even if this regulatory constraint is addressed, there are other important considerations which will play an important role in determining whether a central procurement function by the ERIC for the benefit of the Partners and Components is advantageous. These considerations may include issues such as:

- Resources available, capacity and capability in the ERIC to conduct large scale procurement activity;
- Logistics capability;
- Insurance;
- Liability in case of a challenge from aggrieved suppliers;
- Administrative costs associated with large scale procurement;
- Contract management and disputes with suppliers.

If the DANUBIUS-ERIC were to act as a central procurement body, it will need to have the resources required in order to handle these issues and address potential difficulties along the way, especially if the purchasing volume is likely to be significant.

## **6.2 Joint procurement**

Given the nature of the DANUBIUS-ERIC as a “light” legal entity (with the Components being “outside” the legal entity), it is unlikely that DANUBIUS-ERIC will require to purchase significant volume of supplies, services or works for its own use. Therefore, the possibility for the ERIC to conduct joint procurement with the Partners seems remote.

However, this does not exclude the possibility for two or more DANUBIUS Partners to conduct joint procurement among themselves.

## **6.3 Coordinated procurement**

The more basic “common procurement” approach, which involves a joint effort on the preparation of common technical specifications for works or supply or services that will be procured by the Partners independently (or jointly by some of them), seems less onerous from a regulatory or administrative perspective.

Under a coordinated procurement approach, DANUBIUS-ERIC and the Partners will work together to agree the technical specifications required for the various Components and possibly issues such as timing and costs. These issues will be addressed in the pre-procurement stage. Once the technical specification agreed upon, each Partner will then conduct its own procurement process and will have to deal with the issues identified under section 6.1 above, independently.

## **7. Conclusion**

Common procurement implies a joint effort between the DANUBIUS-ERIC and the Components (or the Partners acting on behalf of the Components) to procure goods, services or works.

There is more than one way to conduct common procurement with a varying degree of legal and administrative constraints.

If the DANUBIUS-ERIC were to act as a central procurement body, it will either have to follow the EU procurement rules, or follow its own rules provided the ERIC members agreed (by way of appropriate provisions in the Statutes) to oblige the DANUBIUS Partners to award or organise their procurement in accordance with procurement procedures established by the DANUBIUS-ERIC. Whatever the case maybe, if the DANUBIUS-ERIC acts as a central purchasing body, it will need to have the resources needed to carry out large scale procurement activity.

The alternative to central purchasing is a coordinated procurement, whereby the DANUBIUS-ERIC and the DANUBIUS Partners will work together to agree the technical specifications required for the various Components and possibly issues such as timing and costs. Once these issues are agreed, each DANUBIUS Partner will then conduct its own procurement process independently, or jointly with one or more other DANUBIUS Partners, and will need to address the issues identified under section 6.1 above.



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