D6.3 Best Practices Guidance Document on Insurance, Contracting and Intellectual Property

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* Further discussion/bilateral interviews about IPRs, WP3 discussion workshop to consider results and propose recommendations.

Thanks to the Work Package 3 leader, Anne-Charlotte Fauvel, EATRIS ERIC

Task 3.6 in WP 3 (Operation, Administration, HR and Finance)

“This task will assemble a set of best practices regarding contracting (such as with users, suppliers), intellectual property policies and insurance. Through targeted interviews, the key issues for each item will be investigated, and the solutions (if any) be recorded. Through debate in the forum, a set of best practices will be developed, framed such that future ERICs can benefit from this knowledge by adopting solutions into their standard terms (for users) operating structures and governance Rules of Procedure” (Annex 1: 18).

! ERICs: domains; single-sited/distributed; geographical scope; employer status etc

Task 3.6

Task leader:	ESS ERIC
Survey:	2019/2020
Desk/documentary review:	2020
(Support to ERIC Committee re	*Guidelines – April- August 2020)*
Interviews with ERICs:	2021 (plus 2020 pre-ERICs)
Clarification actions:	2021
Deliverable preparation &	
WP3 Workshop:	2021

Deliverable 3.6

Submitted: December 2021 (M36)

Executive summary

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- *Conclusions and Recommendations*

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Annexes

1 Indicative overview of ERICs with Rules of Procedure or Dedicated Policies – Intellectual Property Rights, Insurance and Contracting
2 Mapping Intellectual Property Rights

Intellectual Property (IP) & IP Rights (IPR)

The Statutes of an ERIC shall contain at least….

(g) the basic principles covering: …(iv) the intellectual property rights policy (Regulation No 723/2009 *Art 10 Statutes)*

Statues of ERICs

- International law – WIPO, definition of IP
- Identification of IP rights and applicable law
- Identification of contractual arrangements

2021 IP = ‘creations of the mind’
1967 WIPO Convention provides that: intellectual property” shall include the rights relating to literary, artistic and scientific works, performances of performing artists, phonograms, and broadcasts, inventions in all fields of human endeavor, scientific discoveries, industrial designs, trademarks, service marks, and commercial names and designations, — protection against unfair competition, and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields. [Art 2(viii)“]

EG: The term ‘intellectual property’ shall in these Statutes be understood in accordance with Article 2 of the Convention Establishing the World Intellectual Property Organisation (WIPO) signed on 14 July 1967. (CESSDA ERIC)

No generic term that satisfactorily covers all the different the different forms and related rights:

There are a number of different rights arising from different forms of intellectual property: “the different types of intellectual property rights – patents for inventions, copyright for literary and artistic works and associated products, and trade marks and names for the goodwill attaching to marketing symbols – cover distinct subject matter and have different objectives. The law on each varies in strategic ways.” (Cornish et al, Intellectual Property, 2017:5-7)

Annex 2 presents the different types of IPR (European IP Helpdesk, 2019).

We asked:	17 ERICS responded, plus 1 ‘pre’-ERIC (at 23/1/2020)
IPR policy, addition to statutes? Available?	5 - 3 now available on websites (European Spallation Source, INSTRUCT, EMBRC, EMSO, plus ELI)
How are IPR addressed in course of operations?	Mainly claim full ownership by ERIC (e.g. EMSO, ESS ERIC)
Types of IPR	Patents (n=4; copyright (n=3); design right (n=2); database right (n=4); trademark (n=5), ‘other’ (n=7 -eg software standards, use of creative commons licences (CC)
Specific IPR policy for H2020 participation?	9 – No General grants policy; reference to rules established in CAs
Expert help engaged?	4 – Yes; 9 – No [sometimes, if filing a patent]
Designated staff ?	2-Yes; 11-No

Trade mark registration

“All ERICs should file for TM protection and protect their rights. It’s a matter of identity and protection of international reputation.” (EMSO ERIC)

“Because companies register their mark and EPOS has been using the logo for 10 years. The community know it well and EPOS is that mark. As soon as they see it, they can understand what is being talked about. And [it is] not only the team that will use the logo but it will be used by 14 different countries, 1000 institutions. It is not just a legal image but a means where[by] a community can recognize the work done in 10 or more years” [EPOS ERIC].

TM

“EATRIS ERIC has registered its logo (figurative trademark) and word (verbal trademark) EATRIS as CTMs, Community Trademarks, giving protection to word and logo. in every EU member state. It did so because the trade mark is a tool to gain distinctiveness; to increase recognition and to boost visibility. Trademarks are registered in accordance with Nice Classification for goods and services that contains 45 different classes. EATRIS ERIC selected scope of protection according to the field and particular services of the EATRIS ERIC. The protection of the distinctiveness of the logo appearance is considered important.” (EATRIS ERIC).

eSearch plus

The EUIPO's database access

EMSO ERIC

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Trade marks (1) | Designs (0) | Owners (0) | Representatives (0)

1 search result(s) in 1 page(s) in 0.415 seconds 1

100

Actions | Export .xlsx

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018008709 - EMSO ERIC - European Research Infrastructure Consortium + info

Trade mark information

Trade mark number	**018008709**
Type	**Figurative**
Filing date	**10/01/2019**
Registration date	**17/05/2019**
Nice Classification	**42**
Trade mark status	**Registered**
Basis	**EUTM**
Reference	

Owner information

Owner ID number	**976226**
Owner name	**Emso**

Representative information

Representative ID num...

Representative name

Last publication

20/05/2019 **B.1**

Key messages

“Do not delay discussion, drafting and conclusion of your IPR policy. You need to do it at the beginning as the organisation has different issues at different stages. The IPR policy should include a review period. For example, the ESS IPR policy has a review scheduled to take place 6 months prior to the commencement of the user programme. The ESS ERIC IPR policy [Intellectual Property Rights and Inventions Policy, 2016] was discussed long before its adoption by Council in December 2016.”

(European Spallation Source ERIC)

Key messages

Prepare, and keep updated, a listing of IP assets (inc. pre ERIC)

Check that IPR clauses are included in all agreements, regulating ownership and future use of IP.

Ownership issues should also come into disseminating knowledge (ELI ERIC)

See dedicated IP Policies: e.g. European Spallation Source ERIC; INSTRUCT ERIC has branding guidelines for use of its mark.

Insurance

The Statutes of an ERIC shall contain at least….

(f) the liability regime, in compliance with 14(2) (ERIC Regulation, Art 10 Statutes)

Art 14 Liability and Insurance

…

If the financial liability of the members is not unlimited, the ERIC shall take appropriate insurance to cover the risks specific to the construction and operation of the infrastructure…. (ERIC Regulation (Reg 723/2009)

INSURANCE

We asked:	17 ERICS responded (plus 1 pre- ERIC)
Insurance policies?	No - 2 ERICs
What policies?	Professional indemnity; third party liability, cyber-insurance; travel insurance; health insurance, premises and equipment
Approximate cost?	€2, 000 - €371,000
Expert help engaged?	Yes – 3 ERICs
Designated member of staff dealing with this?	Yes – 6 ERICs

Type of Insurance	Covers	Example ERIC
Professional indemnity	Covers legal costs in the event of legal action taken against an ERIC	EMBRC ERIC
Third party liability	Third-party insurance is a policy purchased by the insured (first party) from the insurance company (second party) for protection against the claims of another (third party).	BBMRI
Cyber-insurance [cyber-liability and privacy coverage]	Breach response costs following a breach event or a cyber-extortion threat; privacy regulatory files and expenses; damages and claims	EATRIS ERIC European Social Survey ERIC
Health insurance	Private health insurance	EMBRC ERIC CERIC ERIC
Travel insurance (for employees)	Travel insurance policies are designed to provide cover for many eventualities, including medical expenses, a trip being cut short or cancelled, and loss or theft of possessions	INSTRUCT ERIC
[Management Protection Insurance] Director's insurance Directors' & Officers insurance	The main cover under a management liability policy is directors' and officers' insurance (D&O), with optional protection for employment practices liability (EPL), corporate legal liability (CLL), and crime insurance. However, each insurer's standard management liability insurance policy varies. This covers the actions of the Director or Board of Directors	CLARIN ERIC
Business liability	Corporate legal liability (CLL) insurance is similar to D&O insurance but defends claims made against the company as opposed to individuals. These claims range from maladministration of a company pension, an employee benefit claim, breach of data protection or corporate identity crime (www.marshcommericial.co.uk)	BBMRI ERIC

Key messages

The main issue is the legal status of EMSO ERIC since the legal entity form is part of the risk assessment by the insurer. Since the legal status of the entity is not immediately classifiable this requires some time to assess the related risk. (EMSO ERIC)

"Several banks and assurances [were approached] to find the right solution to cover EPOS ERIC and the Executive Director from damages and risks. It seems that the EPOS ERIC legal nature does not permit [the application] of [existing] commercial instruments."

*Specifically, insurance such as the Director & Officers Liabilities (D&O) covering "liabilities of the corporation itself as the personal liabilities for the directors and officers of the corporation [was deemed] as not fitting [/applicable] because EPOS is a private body managing public money." (*EPOS ERIC)

Key messages

- ERICs should consider the range of policies that may protect against claims on the ERIC, its directors, or following use of the services/goods/instruments provided by the ERIC.
- Insurance costs could (should) be specified in budgets.
- Resourcing insurance related matters should be considered in development of staff role profiles/budgets (either dedicated staff or external specialist consultancy).

Example of EMSO ERIC presented (accidents in the workplace)

Contracting

ERIC has legal personality and so can enter into contracts

Focus is on general contracting activities – note ERIC Regulation provides for procurement arrangements and possible independence from EU Procurement Directive – dependent on ERICs

Applicable law – arising e.g. for ERICs in UK

We asked:	17 ERICs responded plus 1 non -ERIC
Contract with external providers (products & services, consultants)	No - 2 ERICs
Total value, p.a.	€25,000 - €200M
Types of suppliers (Answered as ‘types of supplies)	individuals, SMEs, multi-nationals (Legal, IT, accounting and auditing, communication, research)
Expert help engaged?	Yes – 3 ERICs
Designated member of staff dealing with this?	Yes – 6 ERICs
Does the ERIC conclude contracts on behalf of its nodes?	2- the ERIC concludes the contracts on behalf of nodes 4- the nodes conclude the contracts themselves

Services & Goods to ERICs

Accountancy and audit services (e.g. EPOS ERIC; ESS ERIC (Social); DARIAH ERIC; ICOS ERIC; INSTRUCT ERIC; ELI ERIC; EATRIS ERIC)

Legal services (e.g. EPOS ERIC, ESS ERIC (Social) DARIAH ERIC, ICOS ERIC, EATRIS ERIC, INSTRUCT ERIC)

HR and employment services (EATRIS ERIC,

Tax services (eg European Social Survey ERIC, C ERIC ERIC)

Communication services (eg Euro-Argo; ICOS ERIC)

Meeting/conferences services (eg CLARIN ERIC)

Website hosting and related services (e.g. ICOS ERIC)

IT Services (ICOS ERIC; EATRIS ERIC)

Research services/ Survey agencies (SHARE ERIC)

Equipment (European Spallation Source ERIC)

Other contracts

Contracts with member institutions or nodes of an ERIC

- CESSDA ERIC - CESSDA Service Level Agreement
- EATRIS ERIC - EATRIS Framework Agreement

Contracts with users

- EMSO ERIC Translational Access Agreement
- EU Open Screen ERIC: RoP Partner sites will include ERIC's requirements in the contracts with users

Key issues

Need for standard clauses for different contracts

Need to consider data protection in all contracts (esp. extra EU)

Key messages

- Contracting by ERICs is linked to the wider policies on procurement developed by an ERIC. The range of goods and services required by, and the scale of costs of such goods and services to an ERIC varies according to whether the ERIC is single-sited or distributed. The alignment of clauses within policies to the different goals of the ERICs was identified as an important matter requiring attention.
- Through the ERIC Forum, ERICs should explore the possibility of jointly contracting suppliers.
- The establishment of an ERIC Framework could be also be explored (following one tendering exercise, suppliers are included in a listing that may be used by all ERICs (A procurement framework - or public sector framework)

We asked:	12 ERICS responded
Are there any other challenges your ERIC faces with IPRs, contracting and insurance arrangements?	12 responses: 8: No; 4 provided comments: “No, but we never feel that we are in full control of this aspect, and the advice solicited never cover all the issues.” (IP) “Not at this time, but as the ERICs activities ramp up and increase, including contracts with the private sector, this may require additional resources.” (IP) “The extension of some benefits (insurances) to employees hired abroad.” (Insurance) “IPRs are important in respect of the arrangements with suppliers of tools; contracting includes OJEU tendering activities Insurance is affected by the context of the hosting institution (university). (IP, contracting, insurance)

Summary - key messages

Intellectual property: Intellectual property and related rights should be (explicitly) addressed as part of the management of an ERIC, based on its business model, and as soon as possible in the lifecycle of an ERIC.

Insurance: insurance should be considered in relation to the diverse risks for ERICs.

Contracting: address nature of the ERIC as a first step; contracts with users may be through Service Level Agreements. The need to ensure that policies are aligned so that, for example, employment clauses do not inhibit innovation/creativity, was identified as a particular theme.

‘Open questions’ & possible solutions

1. Are activities giving rise to intellectual property well defined in agreements with hosting institutions and nodes?

Agreements with hosting institutions and nodes can be reviewed to ensure that matters relating to intellectual property are addressed clearly and with agreed definitions and procedures

2. How can the specific character of an ERIC be conveyed to insurance brokers in a manner that allows/enables the purchase of correct insurance for the ERIC?

The availability of a formal statement from, for example, the ERIC Forum may further clarify the nature and status of an ERIC.

3. Are the procurement rules for an ERIC clear, enabling internal auditors, to appreciate that the agreed ERIC procurement policy applies, not national rules?

Including a clear statement about the precedence of the procurement rules agreed by the ERIC, as applied to the procurement of goods and services by the ERIC, may act as a corrective to any misunderstanding.

(1-3 raised during WP3 Workshop Dec. 2021)

Recommendations

(1) Intellectual Property: the ERICs ensure that the intellectual property generated by its activities is clearly defined, identified and protected, as appropriate, particularly in agreements between ERICs and hosting institutions.

(2) Insurance: the ERIC Forum considers the preparation of a statement for use by ERICs that clarifies the legal status of ERICs – i.e. entities performing a public service mission.

(3) contracting: the ERIC Forum further explores the possibility of ERICs jointly contracting a supplier. This may include consideration of the establishment of an ERIC procurement Framework. (Legal personality required.)



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