

Deliverable no	3.6
Deliverable Title	<i>Best practices guidance document on contracting, insurance and intellectual property for ERICs</i>
Contractual delivery month	M36
Responsible Partner	ESS ERIC
Author(s)	Lorna RYAN (ESS ERIC)

Acknowledgements

Thanks to partners in the ERIC Forum Implementation Project for their input into the preparations of this Deliverable and to the ERIC Forum generally at which discussions about the topics addressed in this Deliverable have taken place. WP3 partners are BBMRI, CERIC , CESSDA, CLARIN, DARIAH and EATRIS, ECCSEL, ECRIN, EMSO, EURO-ARGO, European Spallation Source, ICOS, JIV, INSTRUCT, LIFEWATCH, SHARE, INFRAFRONTIER, EMBL, EMBRC, FBV-FMP, ELI, and INGV.

Thanks to the following for further information and discussion/bilateral interviews about IPRs, and a WP3 discussion workshop to consider recommendations arising, in particular:

Susan Deneke, INSTRUCT ERIC, Tamara Carapina, EATRIS ERIC; Alearo Furlani, EMSO ERIC;

Milos Davidovic, Jimmy Andersen, Fredrik Livendahl, and Mauro Zambelli, European Spallation Source ERIC, Florian

Gliksohn, ELI ERIC; Barbora Hamlova, and Luc Deltombe, BBMRI ERIC; Andrea Oepen, Daniel Schmidutz, SHARE ERIC;

Diana Piras and Daniela Murcurio, EPOS ERIC; Christine Kubiak, ECRIN ERIC; Maren Kappe, EU OPENSOURCE ERIC; and

Carlo Rizzuto, C-ERIC ERIC. Finally, thanks to the Work Package 3 leader, Anne-Charlotte Fauvel, EATRIS ERIC.

Executive summary

Over the course of implementation of the ERIC Regulation, from the first research infrastructure to be granted ERIC status, SHARE ERIC, in March 2011 to the most recent, ELI ERIC, in April 2021, ERICs have addressed the requirements of the Regulation in a variety of ways. As novel entities in the European research ecosystem, the experiences and learning of these ERICs have clear utility for successive research infrastructures. This Deliverable presents examples of ERICs' responses to intellectual property, insurance and contracting. Intellectual property policies are required by the ERIC Regulation, as is the need for appropriate insurance. These are two of a number of 'essential elements' of ERIC Statutes. Contracting is related to Procurement, also an 'essential element' of the ERIC Statutes.

For **intellectual property**, the key guidance is the need to address IP and IPRs as soon as possible in the lifecycle of an ERIC. ERICs in operation provide examples of IPRs claimed and a limited number of ERICs have prepared dedicated Intellectual Property Policies. Other ERICs incorporate principles and required procedures within broad Rules of Procedure/Implementation Rules and others address intellectual property issues within other policies. Key messages about IPR are presented and tools for preliminary mapping of intellectual property within ERICs are presented. A key issue in respect of intellectual property and ERICs relates to the arrangements in place between ERICs and the hosting institutions, usually universities, raising matters of 'legacy' as well as the need for detailed clauses pertaining to ownership within such agreements.

For **insurance**, the key guidance relates to the need to address insurance requirements - and liability - within wider consideration of risk, for example, in an ERIC's Risk Register. The range of reported insurance policies in place for ERICs varies by the individual ERICs and the risks arising (between distributed v single sited, employer/not). A particular challenge for ERICs is the lack of familiarity of insurance providers with this novel legal form, a challenge that has resulted in delays in securing appropriate insurance.

For **contracting**, the diverse contracting arrangements of ERICs are indicated and including the operation of ERICs in respect of EU RTD programmes, including the utilisation of 'Linked Third Party' agreements. A review of this topic indicates the need for allocation of costs for 'contracting' in the budgets of ERICs. A key issue – an 'open question' – given the commonality of services required across the 22 ERICs, relates to how ERICs may jointly contract services.

Recommendations arising for consideration by the ERIC Forum in addressing the challenges experienced by ERICs, it is suggested that the ERIC Forum prepares a statement about the ERIC legal form that can be used by ERICs in the negotiation of such matters as insurance; and, that with the ERIC Forum further explores how ERICs may jointly procure goods and/or services. Options for consideration include joint procurement between ERICs and/or cross EU/EEA-wide Frameworks.

Contents

Section 1 Introduction

Section 2 Intellectual Property

- 2.1 Introduction
- 2.2 ERICs and IPRs – statutes
- 2.3 ERICs’ responses/key issues
- 2.4 Actions/Best Practices
- 2.5 Key messages for new and existing ERICs on IPRs
- 2.6 Strategy: mapping IPRs

Section 3 Insurance

- 3.1 Introduction
- 3.2 ERICs and insurance – statutes
- 3.3 ERICs responses/key issues
- 3.4 Actions/Best Practices
- 3.5 Key messages for new and existing ERICs on insurance
- 3.6 Strategy: selecting insurance cover

Section 4 Contracting

- 4.1 Introduction
- 4.2 ERICs and contracting – legal aspects
- 4.3 ERICs responses/key issues
- 4.4 Actions/Best Practices
- 4.5 Key messages for new and existing ERICs
- 4.6 Strategy: contracting resources

Section 5 Conclusions and ERIC Forum Recommendations

Annexes

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

SECTION 1 Introduction

This Deliverable *Best practices guidance document on contracting, insurance and intellectual property for ERICs* (D3.6), presents details of the ways in which ERICs have addressed matters of contracting, insurance and intellectual property. It is linked to Work Package 5 Communication and Dissemination, specifically Task 5.2 *Online Toolbox with Best Practices' Guidelines*.

By the end of 2021, 22 ERICs have been established. The ERIC Regulation (*Council Regulation (EC) No 723/2009 of 25 June 2009 on the Community legal framework for a European Research Infrastructure Consortium (ERIC), amended 2013*) has been subject to a review by a European Commission Expert Group on the ERIC Regulation (EGERIC), and an initial report presented in September 2021¹. This follows two earlier reports from the European Commission to the Council of the implementation of the ERIC legal framework (in 2014 and 2018). A further report is due in 2022. In addition, the ERIC Committee considered amendments to the *ERIC Practical Guidelines* (2015), a process to which the ERIC Forum, and particularly WP3, contributed. These Reports touch on matters relating to intellectual property policies, insurance and contracting activities of ERICs and are referred to as appropriate in this Deliverable. It aims to highlight key issues arising in relation to each topic, indicate responses and actions and suggest 'best practice' in terms of possible actions.

This report is the output of Task 3.6, 'Contracting, insurance, intellectual property consequences on Rules of Procedure best practice for new ERICs' in Work Package 3 *Operations, Administration, HR and Finance of ERICs*, deals with intellectual property rights, insurance and contracting in ERICs. This task was led by ESS ERIC and covered the following activities:

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, as 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).

¹ <https://op.europa.eu/en/publication-detail/-/publication/cdbe5c78-353b-11ec-bd8e-01aa75ed71a1/language-en/format-PDF>

The report is informed by desk research, document review, bilateral discussions with individual ERICs and discussion at the ERIC Forum and within the Work Package meetings over the course of project. The resulting Deliverable, a report, is publicly available, prepared for Month 36 of the project, December 2021.

The Deliverable is structured as follows: following this Introductory section, three sections are presented dealing with intellectual property rights, insurance and contracting. For each, results of a survey of ERICs and elaborations through desk research, online bilateral interview or correspondence is presented, illustrating the varied approaches to each topic. The examples highlight best practices in the approaches taken by different ERICs in relation to the different topics. The concluding section presents the main lessons arising indicating best practices identified and the recommendations arising.

Three overarching recommendations arise in achieving best practice:

1. ERICs to pay particular attention in the agreements for hosting ERICs to the results and associated intellectual property rights arising and to clarify ownership arrangements as a priority matter.
2. The ERIC Forum to consider how ERICs can enter into joint procurement exercises for the supply of good and services. Such procurement would undoubtedly result in lower costs to ERICs, both in terms of the supplies themselves and in terms of the organisation of procurement exercises.
3. The ERIC Forum to consider the preparation of statement on the legal entity ERIC for use by ERICs for insurance purposes.

The Annexes present background information/resources. Annex 1 presents an overview of ERICs indicating those that have prepared publicly available Rules of Procedure (RoP), and web links to same, as well as indicating where dedicated policies in respect of insurance, contracting and intellectual property are available. These provide a readily available resource for use in drafting articles. In addition, prospective and early stage ERICs may wish to consult with these ERICs for further elaboration on different aspects. Annex 2 presents possible tools for use by ERICs in mapping intellectual property arising and related rights.

SECTION 2 Intellectual Property

2.1 Introduction

The policy context within which the ERICs operate constitutes a reference point for the focus of tasks and for the implementation of actions. This context includes the relaunched *Industrial Strategy for Europe* (2020), the *Action Plan for Intellectual Property* (2020) and the release of the Commission Communication, *A new ERA for Research and Innovation* (2020). In November 2021, the European Commission published the *European Research Area Policy Agenda: Overview of Actions for the period 2022-2024* (European Commission, 2021). This includes actions for both intellectual property (2021:10) and research infrastructures (2021:11). For the former, the Commission notes that the 2008 Commission *Recommendation on the Management of Intellectual Property in Knowledge Transfer Activities* will be refreshed and codes of practice to provide guidance produced (2021:10).

A further reference point is the *European Charter for Access to Research Infrastructures* (2016)². It states that

Research infrastructures, including e-infrastructures, are at the core of the **knowledge triangle of research, education and innovation**, and therefore play a vital role in the advancement of knowledge and technology and their exploitation [...] Stronger interaction and cooperation between Research Infrastructures, Users and **providers from industry** and public services builds bridges between the public, commercial and Research Infrastructure worlds. Dedicated initiatives can help increase knowledge and **technology transfer** from science to industry... (2016:6, emphasis added.)

The Charter notes that “Research Infrastructures must comply with national and international law and agreements, particularly, but not only, in areas such as intellectual property rights and the protection of privacy, ethical considerations as well as safety, security and public order regulations when designing rules and conditions for Access to and use of Research Infrastructures” (2016:10). Considering the Regulatory framework, the Charter proposes that “Access to any given Research Infrastructure should be regulated by a framework that can range from generic terms and conditions for use accepted by the User, through a dedicated contract up to the provisions of international agreements

² The Charter European Commission (2016) *European Charter for Access to Research Infrastructures Principles and Guidelines for Access and Related Services*, https://ec.europa.eu/research/infrastructures/pdf/2016_charterforaccessto-ris.pdf <accessed 2.12.2021>

and treaties. The regulatory framework should cover, at the least, Access, intellectual property rights, data protection, confidentiality, liability and possible fees. The Charter recognises that ‘access to Research Infrastructures may be limited, amongst others, by factors such as privacy and confidentiality; commercial sensitivity and **intellectual property rights**; ethical considerations in accordance with applicable laws and regulations. (2016:13, emphasis added).

Clarity about intellectual property rights is important to ensure that access to RIs is optimal.

The European Commission Expert Group on the ERIC Regulation in draft Assessment on the Implementation of the ERIC Regulation (August 2021) in a section titled ‘Improving links with Society, Economic and Competitiveness’ (2021:31 ff) referred to consideration of the extent of implemented IP policies (including IT services/spin-off/incubators). Its review sets out key issues in considering IPRs and ERICS.

The Expert Group comments that

The technological development, innovation and knowledge transfer are indicated in their missions in 75% of the ERICs statutes...[H]owever, the effective implementation of these policies requires dedicated resources and this may conflict with the limit of net income provided by these activities and the focus of available resources what are directed by the contributing members mainly to the basic RI activity. [...] Assessing how much the net returns of IP policies could be made more effective needs to take into account the limited openness of the overall innovation market of the EU.... (2021:32)

It notes that the members of the ERIC Forum show a definite interest in implementing IP policies. The reviewers conclude:

The focus of members contributions to the ERICs core activities in their establishment and operation may conflict with the need to dedicate part of the resources to outreach and technology transfer activities. For the nodes of distributed ERICs, activities developed within the ERIC may conflict with those “owned” by the hosting institutions. It is recommended that, in setting up and overall strategy for the ERIC system, focused actions and resources are made available for outreach and technology transfer activities, to overcome these difficulties. For what regards the extension of the ERIC legal approach to the wider university or innovation activities, it is recommended that a specific study is developed based on the effective scope of this enlargement and taking into account the legal and fiscal constraints (2021:32).

The Expert Group draws attention to implementation conditions in ERICs. A particular issue that requires attention concerns ‘legacy’ arrangements and ‘legacy’ background of individual projects that is used by the ERIC, as well as the provisions for Intellectual Property Rights in the Hosting Institution Agreements between ERICs, and for the most part, Universities.

How ERICs, in all of their varied forms, address intellectual property rights has been subject to relatively scant consideration, excepting Yu et al 2017, Ryan, 2019³). IPRs and biobanking has a rich literature, see for example, Verlinden et al 2015⁴). The wider debates about the merits or otherwise of intellectual property rights are not addressed in this report. Intellectual property, related rights and their protection is assumed to be an important element of a wider business strategy.

2.2 ERICs and IPRs - the ERIC Regulation

The need for a policy relating to intellectual property is an essential element of the ESS ERIC Statutes. Box 1 presents these essential elements, including the requirement for an ERIC to have an intellectual property rights policy.

A review of the required Intellectual Property article(s) of the statutes gives rise to the observation that. It most of the articles indicate which international law is used to provide the scope of the definition of ‘intellectual property’; the identification of any particular IP rights that are expected to arise for a specific ERIC and the applicable law and jurisdiction (see also SHARE ERIC Statutes, art. 11 *Intellectual Property*, for a rare instance in which the principle of territoriality of intellectual property rights is directly addressed in the Statutes⁵). Some Articles are IP specific; others consider IP and data policy (for example, ICOS ERIC, Article 18 *Data policy and intellectual property rights policy*), EU OPENSREEN ERIC *Rules of Procedure* contain an annex

³ Yu, H. Wested, J.B. and Minssen, T. (2017) Innovation and intellectual property policies in European Research Infrastructure Consortia – Part 1: The Case of the European Spallation Source ERIC. *JIP&P*; Ryan 2019, Balancing Rights in the ERA, EIPR: [Balancing Rights in the European Research Area: The Case of ERICs | European Commission \(europa.eu\)](https://ec.europa.eu/eipr/publications/balancing-rights-in-the-european-research-area-the-case-of-eric)

⁴ Verlinden, M., Minssen, T and Huys, I. (2015) ‘IPRS in biobanking-risks and opportunities for translational research’, *IPQ*, 107.

⁵ SHARE ERIC art 11.3 ‘With respect to questions of Intellectual Property, the relations between Contracting Parties will be governed by the national legislation of the Contracting Parties.’

on IPRs (in which provision is made that the “the layout of the homepage, the used graphics and all other contents are protected by copyright”).

Box 1 Required Elements of the ERIC Statutes

Article 10 Statutes

The Statutes of an ERIC shall contain at least the following:

- (a) a list of members, observers and, where applicable, of entities representing members and the conditions of and the procedure for changes in membership and representation in compliance with Article 9;
- (b) the tasks and activities of the ERIC;
- (c) the statutory seat in compliance with Article 8(1);
- (d) the name of the ERIC in compliance with Article 8(2);
- (e) the duration, and the procedure for the winding-up in compliance with Article 16;
- (f) the liability regime, in compliance with Article 14(2);
- (g) the basic principles covering:
 - (i) the access policy for users;
 - (ii) the scientific evaluation policy;
 - (iii) the dissemination policy;
 - (iv) **the intellectual property rights policy;**
 - (v) the employment policy, including equal opportunities;
 - (vi) the procurement policy respecting the principles of transparency, non-discrimination and competition;
 - (vii) a decommissioning, if relevant;
 - (viii) the data policy;
- (h) the rights and obligations of the members, including the obligation to make contributions to a balanced budget and voting rights;
- (i) the bodies of the ERIC, their roles and responsibilities and the manner in which they are constituted and in which they decide, including upon the amendment of the Statutes, in compliance with Articles 11 and 12;
- (j) the identification of the working language(s);
- (k) references to rules implementing the Statutes.

The Statutes shall be publicly available on the website of the ERIC and at its statutory seat.

2.2a Intellectual Property - Definition

‘Intellectual property’ is difficult to define. In the ERIC Statutes the commonly used definition is taken from the WIPO Convention:

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)

This Convention provides that:

(viii) “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.

Cornish et al assert that there is no generic term that satisfactorily covers all the different the different forms and related rights:

Patents give temporary protection to technological investigations and design rights to the appearance of mass-produced goods; copyright gives longer lasting rights in, for instance, literary, artistic and musical creations, trademarks are protections against imitation so long at least as they continue to be employed in trade. (Cornish et al, *Intellectual Property*, 2017:7)

There are a number of different rights arising from different forms of intellectual property: as Cornish et al state “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).

2.3 ERICs responses/key issues

As required, all ERICs make provision for intellectual property in their Statutes. How this has been implemented was the focus of a survey undertaken in December 2019-January 2020. 17 ERICs and 1 ERIC-in-waiting responded. Key findings included:

- 4 ERICs reported the existence of a dedicated intellectual property rights (IPR) policy beyond the statements relating to IP in their Statutes: European Spallation Source ERIC; INSTRUCT ERIC; EMBRC ERIC; EMSO ERIC (ELI Light, in the process of applying for ERIC status).
- Most ERICs claim intellectual property rights. This is rights claimed relate to copyright and creative commons; design right; trademark; database right; patent.
- Trademarks registered by European Spallation Source ERIC, INSTRUCT ERIC, BBMRI ERIC, EATRIS ERIC.

- Engagement of external supports in the development of IPR Policies is variable; some ERICs reported engaging expert input.
- Within H2020 projects, the general provisions of the Grant Agreements held, as modified by the Consortium Agreement.
- 1 of the 18 ERIC reported dedicated staff dealing with intellectual property matters (for those ERICs with legal counsel employed, it is expected that they would deal with IPRs).

The elaboration of the policy on IPR differs across the ERIC grouping – for example, some ERICs have developed dedicated, separate policies, whereas others have included details of how IPR is to be treated within a wider policy. Some ERICs’ RoP include statements on how IPR will be addressed e.g. Appendix 5 EMBRC-ERIC Intellectual Property Rights Policy of the EMBRC-ERIC Rules of Operation (2021); EATRIS Framework Agreement, EU OPENSREEN, (Internal Rules of Procedure).

The EGERIC has identified particular issues as they relate to ERICs, in particular, it has commented that “For the nodes of distributed ERICs, activities developed within the ERIC may conflict with those ‘owned’ by the hosting institutions.” (2021:34).

Ensuring clear arrangements for the identification of owners of any resulting intellectual property in the agreements between the ERIC and its hosting institution and its notes, is an important consideration.

2.4 Actions/Best Practices

A key IP strategy is protection of good-will and reputation through the protection of names and designs. A number of ERICs have registered their marks. Trade mark registration has been completed by

- European Spallation Source ERIC
- EPOS ERIC
- INSTRUCT ERIC
- BBMRI ERIC
- EATRIS ERIC
- EPOS ERIC*

*At the time of the bilateral discussion, EPOS ERIC was applying for trade mark status, registering first in Italy, following that European registration. Asked about the reasons for registration, the importance of ERICs in the scientific community is indicated:

“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].

“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).

The importance of protecting the trade mark/sign was noted: “all ERICs should file for TM protection and protect their rights. It’s a matter of identity and protection of international reputation” (EMSO ERIC).

INSTRUCT ERIC has developed Branding Guidelines relating to the use of its mark (see Annex 1)

Licensing

INSTRUCT ERIC: INSTRUCT ERIC owns a software management system, ARIA, that is under license from the University of Oxford (license for use in perpetuity). It is licensed for use in perpetuity.

EURO ARGO ERIC provides details of the licensing arrangements for its software:

The Argopy software is a python library that aims to ease Argo data access, manipulation and visualisation for standard users as well as Argo experts and operators (Maze and Balem, 2020). With “Argopy” you can download online or retrieve offline from a GDAC ftp copy a collection of Argo measurements (T/S, and soon all BGC variables) based on a space/time domain or Argo floats numbers. “Argopy” is free, open source, compatible with all platforms and welcomes any kind of contributions.

ERICs may produce either a discrete policy dealing with IPRs matters (e, g European Spallation Source ERIC), include IPRs within general Rules of Procedure/Rules of Operations (e.g. EMBRC ERIC) and/or include IPRs within discrete policies (e.g. EPOS ERIC Data Policy).

The content of the European Spallation Source ERIC's IPR and of INSTRUCT ERICs IPR policy is noted below, as are excerpts from RoP/Rules of Operations.

Income from IP

ECRIN ERIC provides in its Statutes for 'Income generated by IP produced by ECRON shall be used for the operations of the ERIC'. However, to date, no income has been generated. Attention to this dimension of IP is rare across the ERICs and could be an area for further consideration.

Enforcement of rights: Provision for how rights are to be enforced if breached should be considered in IPR policies and procedures outlined. In general, no disputes have arisen to date but allocation of costs relating to possible legal action may be considered. It is recognized that there "needs to be a balance between the enforcement action taken and the potential consequences of infringement".

Table 1 Overview: Addressing IPRs – examples from ERICs – dedicated policy, addressed within Rules of Procedure or addressed within a policy

Dedicated IPR Policy	Within the Rules of Procedure		Addressed within a wider policy
<p>ESS ERIC Intellectual Property Rights and Inventions Policy (2016)⁶</p> <p>Contents:</p> <p>Preamble Definitions IPR Principles Open Access and Open Source Publications Inventions Proprietary information Trade Marks and Images Implementation Amendment</p> <p>INSTRUCT ERIC - INSTRUCT IPR POLICY</p> <p>Contents:</p> <p>Statement of Principles</p> <p>Agreements on ownership, management and exploitation</p> <p>Known Infringements</p> <p>Reservation of pre-existing intellectual property rights</p>	<p>EMBRC ERIC Rules of Operations (2021)</p> <p>A5.1. EMBRC-ERIC Intellectual Property Rights Principles</p> <p>A5.1.1. Following Article 21 of the EMBRC-ERIC Statutes, the EMBRC-ERIC IPR Policy is provided in Appendix 5.</p> <p>A5.1.2. IPR generated from access to EMBRC resources, facilities and platforms belong to those that generated them. Any deviation from this principle will be outlined in the User Access Contract.</p> <p>A5.1.3. In the frame of EMBRC-ERIC, Intellectual Property Rights (IPR) may arise from Research and/or activities carried out for non-commercial purposes and/ or for commercial purposes. Further to Article 21 of the Statutes on IPR, EMBRC-ERIC recognizes five (5) kinds of IPR in its activities:</p> <p>a) IPR owned by EMBRC-ERIC Headquarters (HQ) that was created, obtained, or developed by EMBRC-ERIC HQ and its staff. This shall be owned by EMBRC-ERIC.</p> <p>b) IPR that was created, obtained, or developed jointly by HQ and an Operator(s).</p> <p>c) IPR that was created, obtained, or developed jointly by HQ and a User(s).</p> <p>d) IPR that was created, obtained, or developed jointly by HQ, a User(s) and an Operator(s).</p> <p>e) IPR that was created, obtained, or developed jointly by a User(s) and an Operator(s).</p>	<p>EU OPENSREEN ERIC Rules of Procedure 2020</p> <p>ARTICLE 9 / Intellectual Property Policy 1. The ERIC shall use the following definitions for types of IP: a. "Foreground" means the results, including information, materials and knowledge, generated in activities of EU-OPENSREEN ERIC, whether or not they can be protected. It includes intellectual property rights (IPRs such as rights resulting from copyright protection, related rights, design rights, patent rights, plant variety rights, rights of creators of topographies of semiconductor products), similar forms of protections (e.g. sui generis right for databases) and unprotected know-how (e.g. confidential material). Thus, foreground includes the tangible (e.g. prototypes, micro-organisms, source code and processed earth observation images) and intangible (IP) results of a project. Results generated outside an activity of EUOPENSREEN ERIC (i.e. before, after or in parallel with an activity of that kind) do not constitute foreground. b. "Background" is information and knowledge (including inventions, databases, etc.) held by EU-OPENSREEN or its contractual partners prior to their joint activities or contractual agreements, as well as any intellectual property rights which are needed for carrying out the joint activity or for using foreground. 2. EU-OPENSREEN ERIC may have sole or shared ownership in foreground intellectual property rights created as a result of performing the operational activities of providing compound logistics services and operating the European Chemical Biology Database. Particular examples where IP might be expected to be generated in these areas would include, for example in creation of new compound dispensing technologies or the development of software for screening informatics analysis. 3. Income received by the ERIC related to sole or shared intellectual property rights, shall be used to support the operational costs of the ERIC up to a threshold of 20% of the annual operational costs, as described in the Statutes 27(3). 4. The policy of the EU-OPENSREEN ERIC is not to own or enforce IP rights created as a result of the following</p>	<p>EPOS ERIC Data Policy 2019</p> <p>Section 6: INTELLECTUAL PROPERTY RIGHTS</p> <p>Intellectual property rights subsisting, incorporated or contained within of any DDSS shall continue to belong to the entity/individual that owns or has generated it or holds the rights (by licence or otherwise) at the time of submission of the DDSS to EPOS, except in case where these rights have been specifically waived by the owner/generator/holder. Suppliers are required to verify that the DDSS they provide do not, to the best of their knowledge and belief, infringe any third party intellectual property rights, and ensure that, where identified, third party</p>

Deliverable 3.6

<p><i>Importation and use of third party IPR</i></p> <p><i>IPR Register</i></p> <p><i>Publication of works and submission to standards bodies</i></p> <p><i>IPR on INSTRUMENT activities involving commercial participants</i></p> <p><i>Resolution of disputes over IPR (2013, amended/updated 2019)</i></p>	<p><i>A5.1.4. For cases A5.1.2. b to A5.1.2. e, the parties shall negotiate appropriate agreements to define, and, where appropriate, share and appropriately manage IPR. The IPR agreement, ownership and management shall be included in the User Access Contract.</i></p> <p><i>A5.1.5. In the frame of EMBRC-ERIC, confidential undertakings shall be undertaken by the parties as appropriate.</i></p> <p><i>A5.1.6. In the case of multi-site Research, EMBRC-ERIC should have the role of coordinator of the agreement negotiation linking with the legal departments of the involved Operators.</i></p> <p><i>A5.1.7. EMBRC-ERIC may adopt the role of coordinator or facilitator of an agreement negotiation by the written request of an Operator involved.</i></p> <p><i>A5.1.8. For each agreement concluded in the frame of EMBRC-ERIC, the logo of EMBRC-ERIC shall appear and the context of the EMBRC-ERIC shall be described in the preamble. (EMBRC ERIC Rules of Procedure)</i></p>	<p><i>particular activities: a. Partner assay adaptation sites and users creating new readouts; b. Partner screening sites and users screening the commercial and academic collections; c. Partner chemistry sites optimising the user's hits into lead and candidate compounds; d. Collaborations set up between an academic compound providers and users.</i></p>	<p><i>interests are fully accounted for and acknowledged.</i></p>
---	--	---	---

2.5 Key messages for new and existing ERICs

The experiences of ERICs and the learning arising over the course of implementation are captured by key messages presented below. These are offered while acknowledging that “each ERIC is specific, has its own governance, its own way of doing research”. It depends on how the ERIC is structured and from whom it comes” (EPOS ERIC). This comment foregrounds the multi-faceted nature of IP in relation to ERICs and further directs attention to how the ERIC was created, raising legacy issues.

Intellectual property and how it is managed is important for ERICs. However, it was suggested that:

“attention to IP/considerations of IPRs could be stronger in ERICS. The ERICs should have general policies providing for

1. identity signs;
2. copyright and the data in general; and
3. to do with technology.

[In addition], the 'know how' generated by ERICs is very important; the tacit experience and knowledge that people have and share between the different parts of an ERIC. This knowledge [know how] is special. ERICs are not a project but are a matter of European policy to achieve cohesion and the convergence...(EMSO ERIC)

The European Spallation Source ERIC is one of the few ERICs (INSTRUCT ERIC is another) that developed a specific policy on IP:

“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)”

Drafting policies is time-consuming. It is further not divorced from the business model of an ERIC (managing Intellectual property rights is part of a business strategy, e.g. Smith and Hanson 2002,⁷), a point made by respondents:

“It takes time to define it [the policy on IPR] upfront...and to align it with your particular set-up and situation, that is with your business model.” [EATRIS ERIC]

⁷ Smith, M and Hansen, F. (2002) ‘Managing intellectual property: A strategic point of view’, *Journal of Intellectual Capital*, 3:4; 366-374.

Another ERIC noting the importance of an IPR strategy, commented that ‘This includes the orientation to implementation; it focuses on identifying signs and copyright et cetera. Its purpose is to know what are the strengths of an ERIC, to know where it is heading, its strategic focus’. (EMSO ERIC)

A key factor that may impede the progress of preparing policies is the priority accorded to IPRs – it was noted by the difference between American and European scientists was pronounced in this regard; that scientists are often not as interested in IPR in Europe as they are in the USA -and ERA is characterized by open science and academic sharing.

The need to start early was emphasized by a number of respondents and the unintended consequences of not having a policy foregrounded:

“Don’t delay [with the discussion of IP and management of IPR]. The policies may shape the way you provide your service... Allow for growth.” [INSTRUCT ERIC]

“Deal with IPR as soon as possible.” [EPOS ERIC]

User agreements should be checked to ensure that they cover standard terms relating to the ownership and use of any intellectual property developed. The inclusion of IPR clauses in collaboration arrangements/agreements was identified as an important element of an ERICs approach to IPR (“IPR set of policies will be within these collaboration agreements”)

2.6 Strategy: mapping IPRs

Annex 1 presents an indicative overview of the ERICs that have developed Rules of Procedure (RoP); these RoP include statements on IPR, as per the EMBRC and EU OPENSOURCE examples above; some ERICs have also developed discrete Intellectual Property Policies relating to IPR (e.g. European Spallation Source ERIC, INSTRUCT) and/or IPR issues are addressed within wider policies such as EPOS ERIC’s Data Policy. Following the content of these policies will support individual ERICs in developing their own RI-specific policy.

In implementing the policy and in considering how to address intellectual property and assertion of associated rights as starting point is the identification of what IP is created in and by an ERIC and its users. To this end the tables presented in Annex X are reproduced from (i) the European IP Helpdesk – *Your guide to IP in Europe* (European Union, 2019) and (ii) Mapping potential areas of intellectual Property Protection (S Johnson 2015, *Your Guide to IP, What it is, how to protect it and how to exploit it.*)

IP and the management of rights is regarded as a dynamic field; one group of respondents suggest that IPRs will gain in prominence/receive greater attention as the European Innovation Council develops.

The context in which ERICs operate is important.

The best practices and associated recommendation for action arising are

1. That the asset registers of entities prior to the establishment of ERICs is attended to before the ERIC is legally established;
2. The agreements between Host Institutions and ERICs should have clear provision for IP and ownership;
3. ERIC Forum should provide the institutions/infrastructures with guidance on how to transform IP into a value; it is a tool by which people can be helped to share this value. (EMSO ERIC)

SECTION 3 INSURANCE

3.1 Introduction

The legal status ERIC provides that ERICs are recognised as legal entities, with legal personality, and are able to enter into contracts. ERICs - and the activities undertaken by and on behalf of an ERIC - are therefore eligible entities for a range of insurance policies. This section presents an overview of insurance.

The Regulation provides for insurance in particular instances (when liability of Members is not unlimited), however, a further difference as it relates to insurance between ERICs is whether an ERIC is distributed or single-sited and whether it acts as an employing body. These different characteristics account for the range of insurance policies in place.

The extent and nature of Insurance should be considered as part of routine business risk assessments undertaken by ERICs.⁸ The insurance requirements of ERICs are varied and the liability of different parties are case-specific.

How ERICs have responded insurance requirements is considered below. As a starting point, it is instructive to note the comment by one ERIC that

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)

3.2 ERICs and insurance – the ERIC Regulation

Liability is identified as an ‘essential element’ of an ERICs’ statutes, required by Art 10 of the ERIC Regulation.

⁸ Insurance is defined as “A contract whereby a person called the insurer agrees in consideration of money paid to him, called the premium, by another person, called the insured, to indemnify the latter against loss resulting to him on the happening of certain events. The policy is the document in which is contained the terms of the contract. (Assurance, traditionally, is the word used in relation to an event which will definitely happen at some time, whereas insurance refers to events which may or may not happen, e.g. fire insurance) Insurance is a contract uberrimae fidei (of the utmost good faith). It can be classified into two broad categories: indemnity, where the insured is indemnified against actual loss so that the amount paid is the amount of the loss, and contingency, where a specified sum is payable upon the occurrence of an event such as a death. It is regulated by the Financial Services and Markets Act 2000 [in the UK].” (Woodley, 2013:234). “Liability is defined as ‘subjection to a legal obligation; or the obligation itself. The person who commits a wrong or breaks a contract or trust is said to be liable or responsible for it. Liability is civil or criminal according to whether it is enforced by the civil or criminal according to whether it is enforced by the civil or criminal courts. A contingent liability is a future unascertained obligation” (Woodley, *ibid*).

Box 2 Required Elements of the ERIC Statutes

Article 10 Statutes

The Statutes of an ERIC shall contain at least the following:

- (a) a list of members, observers and, where applicable, of entities representing members and the conditions of and the procedure for changes in membership and representation in compliance with Article 9;
- (b) the tasks and activities of the ERIC;
- (c) the statutory seat in compliance with Article 8(1);
- (d) the name of the ERIC in compliance with Article 8(2);
- (e) the duration, and the procedure for the winding-up in compliance with Article 16;
- (f) **the liability regime, in compliance with Article 14(2);**
- (g) the basic principles covering:
 - (i) the access policy for users;
 - (ii) the scientific evaluation policy;
 - (iii) the dissemination policy;
 - (iv) the intellectual property rights policy;
 - (v) the employment policy, including equal opportunities;
 - (vi) the procurement policy respecting the principles of transparency, non-discrimination and competition;
 - (vii) a decommissioning, if relevant;
 - (viii) the data policy;
- (h) the rights and obligations of the members, including the obligation to make contributions to a balanced budget and voting rights;
- (i) the bodies of the ERIC, their roles and responsibilities and the manner in which they are constituted and in which they decide, including upon the amendment of the Statutes, in compliance with Articles 11 and 12;
- (j) the identification of the working language(s);
- (k) references to rules implementing the Statutes.

The Statutes shall be publicly available on the website of the ERIC and at its statutory seat.

Additionally, in the ERIC Regulation⁹ the requirement for insurance is in place, subject to condition in Article 14 **Liability and insurance**. This provides that

1. *An ERIC shall be liable for its debts.*
2. *The financial liability of the members for the debts of the ERIC shall be limited to their respective contributions provided to the ERIC. The members may specify in the Statutes that they will assume a fixed liability above their respective contributions or unlimited liability.*
3. ***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.***
4. *The Community shall not be liable for any debt of the ERIC (art 14, emphasis added).*

Article 2, Definitions and Article 3 Task and Other Activities of the ERIC Regulation are also relevant in (a) determining the features of an ERIC, its activities; and (b) the location of the activities, including third countries and associated

⁹ Council Regulation [EUR-Lex - 32009R0723 - EN - EUR-Lex \(europa.eu\)](#)

countries. Both the nature of activities and the location of activities may be relevant in terms of insurers’ assessment of both the nature of an ERIC and associated risk(s) arising from its activities.

A review of the Liability and Insurance Articles in the Statues of ERICs indicates that all ERICs commit to taking ‘appropriate insurance’; or ‘appropriate and commensurate insurance’.

3.3 ERICs responses/key issues

A particular challenge experienced by ERICS is the significant effort that ERICs expend in informing insurance agents (among others) about their nature and legal status. A particular instance is raised by EPOS ERIC: EPOS staff have devoted considerable effort in seeking to address the insurance needs of the 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]

Notwithstanding this overarching issue of recognition, of the challenges generated by how ERICs are classified as particular entities by insurance brokers and providers – a matter that extends beyond insurance- this section considers how ERICs have responded to the requirement to take out ‘appropriate insurance’.

ERICs were asked about the insurance policies they had in place; about the costs of insurance and about wider resourcing issues. An overview of the responses from survey is presented below:

Insurance
16 of the 18 reported that they had insurance in place.
The scope of insurance included: Professional indemnity; directors’ and officers’ liability; third party liability; cyber-insurance, travel insurance, health insurance; [other personnel insurance]; premises and equipment.
The costs of insurance vary – this relates to the size of the RI as well as the activities undertaken; €2000 to €371,000* per annum. (* European Spallation Source ERIC)
Three ERICs engaged external support in organising insurance policies.
One third of ERICs have a designated member of staff dealing with insurance.

Issues arising include:

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 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).

While the statutes provide that where the financial liability is not unlimited, then insurance is required (as per art. 14.3 “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”), in those cases in which the liability is limited, the assessment of risk may lead to a decision as to the type of insurance required.

The reasons that insurance is not required include:

[It is] not necessary for the ERIC, insurance for the building is handled by host organisation NWO/ASTRON [JIV-ERIC]

The ERIC only rents offices and administrative services at the host institution. Insurance is covered by the host. Each distributed owner/provider of the ECCSEL facilities [ECCSEL ERIC]

For other ERIC, they may take out insurance but note that the probability of incident is low:

[Insurance cover is taken out for the purpose#: To protect the ERIC in case a float cause[s] damage at sea. In 30 years of the Argo International programme it never happened. (EURO-ARGO)

There is a sliding scale in terms of the range of insurance required and the level of attention accorded to it; for example, the European Spallation Source ERIC commented that

ESS Statutes declare that proper insurance should be in place for the construction and operations phase. Currently, ESS has a full construction project insurance in place. Additionally, there are a number of other insurances in place, i.e. travel, employee insurance, health insurance, etc. [European Spallation Source ERIC]

In all of 22 ERICs, the financial liability is not unlimited. The liability is limited to the contributions (see DARIAH ERIC). Given the range of ERICs and their different risk profiles, the various types of insurance that ERICs may consider and/or have taken out are not referred to in the ERIC regulation, nor in the Statutes of the ERICs.

3.4 Actions/Best Practices

The range of insurance that ERICs have identified as purchased is set out in Table 2 below.

Table 2 Insurance

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.marshcommercial.co.uk)	BBMRI ERIC

Some ERICs have a range of polices in place: for example, the European Spallation Source ERIC, as part of its construction phase included the following insurances:

Travel Insurance, Health Insurance, Construction and Erection (CAR/EAR) Insurance, incl. Public Liability, Marine & Cargo Insurance, Crime Insurance, D&O Liability Insurance, Property Insurance.

The risks requiring insurance cover varies according to the type of ERIC – single-sited (European Spallation Source ERIC) or distributed (see ECCSEL ERIC) and, for some variants, whether the ERIC is an employing body or not. If it is an

employer, then health insurance and travel insurance are taken out. For a distributed ERIC, such as the European Social Survey ERIC, its insurances are for (1) Management Insurance/ Directors’ and Officers’ Insurance; (2) Professional Indemnity and (3) Cyber-insurance. The insurance can cover the core business of an ERIC *and* its activities as part of EU RTD programmes, such as H2020 or HORIZON Europe.

Insurance cover required by an individual ERIC? An example

The required insurance is dependent on the nature of the ERIC, whether it is single-sited or distributed; the nature of its task and the possible risks arising (at construction or implementation phase) as well as its mode of operation – virtual/physical. It also is dependent on whether the ERIC is an employing body.

Example from EMSO ERIC Business Plan	Actual practice
<p>5.0 BUSINESS INSURANCE</p> <p><i>In the interim phase INGV will provide the staff and premises for the CMO. The insurance will only need to cover normal business operations i.e. Employer’s Liability/Workmen’s Compensation and Public Liability. Professional Indemnity Insurance should not be required. INGV insurance policies could cover the insurance requirements of the CMO.</i></p> <p><i>As the EMSO ERIC grows more financially strong and begins to operate infrastructure on behalf of members the insurance requirements will change. At this stage the CMO will need to draw up new contract documents for the EMSO-ERIC that take account of EMSO ERIC Statutes Article 12 on Members’ liability towards the EMSO-ERIC’s debts and liabilities.</i></p> <p><i>A mutual indemnity clause might be included in the service contracts to reduce insurance costs. In compliance with the ERIC Regulation, the hosting country overall framework will be used as the reference for employment conditions for the ERIC. The Italian system is built on public social security. The INPS-Istituto Nazionale per la Previdenza Sociale (National Social Security Institute) is the main social security institution in Italy and all employees in the public and private sector must be insured at this institution. The INPS is subject to the supervision of the Italian Ministry of Labour and Social Policy. With respect to insurance against occupational accidents and illness, the ‘National Institute for Insurance against Occupational Accidents and Occupational Diseases (INAIL) is the public entity, subject to the supervision of the Economic Ministry of Labour and Social Policies, that provides compulsory insurance coverage for all employees. INAIL is mandatory and employers must pay an annual insurance fee.</i></p> <p><i>As the role of the EMSO ERIC expands and where appropriate, the EMSO-ERIC shall take out and maintain insurance to cover any risks relating to the operation of the EMSO-ERIC.</i></p> <p><i>EMSO ERIC Business Plan section 5 EMSO BP January 2014 CLEAN_public.pdf (emso-eu.org)</i></p>	<p>All EMSO Eric employees are covered through two main insurance: first insurance is a security insurance provided by the INAIL (National Institute for Insurance against Accidents at Work and Occupational Disease) covering :</p> <ul style="list-style-type: none"> • Accidents in the workplace • Occupational diseases <p>Accident social security protects all insured workers employed in professional or commercial activities which, depending on their nature, may expose them to the above risks.</p> <p>In case of occupational disease, this protection is accessed through what is referred to as a 'mixed' system. This means that occupational diseases are considered to be not only those listed in the reference tables but also any other illness which the employee can prove is connected to his or her professional activity.</p> <p>Insurance premiums (for which the employer is responsible) and social security accident benefits are handled by INAIL: the National Institute for Insurance against Accidents at Work and Occupational Disease. The cost of the health services and human resources involved (e.g. emergency response and general medical services) is covered by the National Health Service (SSN).</p> <p>The services provided in the event of an accident at work or occupational disease can be of two kinds:</p> <p>in kind: health services, such as supports, prosthetics and assistance and rehabilitation aimed at ensuring maximum possible recovery of the recipient's independence and mental and physical resources, and therefore his or her reintegration into daily life, the family, social and working environments; cash: compensation, either one-off payments or annuities.</p> <p>Beyond this insurance all EMSO ERIC employees benefit of an second insurance: the additional private insurance (ZURICH) covers accidents in the workplace (Infortuni sul Lavoro) or going to the workplace and during business missions.</p> <p>Third party liability is an additional private insurance limited to few people and purchased by EMSO ERIC for protection against the legal claims of</p>

	another (third party) due to specific decisions or responsibilities of EMSO ERIC management. (email correspondence EMSO ERIC, December 2021)
--	--

3.5 Key messages for new and existing ERICs on insurance

The key message arising is that some ERICs expend considerable effort securing insurance cover due to the lack of familiarity of insuring bodies with ERICs, as new legal forms.

The range of insurance is determined by the nature of the ERIC, whether it is distributed or single-sited, as well as its activities and whether it is an employing entity.

3.6 Strategy: Selecting Insurance Cover

The foregoing has indicated the range of insurance policies that may apply to an ERIC. The clear identification of costs of insurance in the budget of ERICs is a matter for consideration, particularly for newly established ERICs.

It is noted that the Swedish Research Council as a member of a number of ERICs has undertaken a study on the liability of national representatives in ERICs. This study report is due in 2022 and may be of relevant for future insurance requirements of ERICs.

The recommendation arising is that the ERIC Forum consider drafting a formal statement on the ERIC legal status that may be used by ERICs in negotiating insurance cover.

SECTION 4 Contracting

4.1 Introduction

This section considers the contracting arrangements that are in place between ERICs and external providers of goods and services, including consultants. ERICs routinely enter into contracts with third party suppliers; some ERICs have contractual agreements in place with internal members and these also act as service providers on behalf of an ERIC. A further set of agreements are often in place with users. This last group of agreements is briefly referred to, in accordance with the task description (Task 3.5). The main focus is on ERICs' experiences in contracting for the provision of services to ERICs.

Nearly all ERICs reported that they have entered into contractual arrangements for the provision of goods and services (survey responses 16/18). Supplies for legal, IT, accounting and auditing and communication services were among the services procured. Research services have also been procured by ERICs. Suppliers are drawn from SMEs, multi-national organisations as well as individual consultants.

The nature of an ERIC is relevant in terms of its contracting activities, specifically whether it is single-sited or distributed. Two of the ERICs responding to the survey reported contracting on behalf of the nodes. (The VAT exemption is thereby applied). For other ERICs (n=4), the nodes conclude the contracts themselves. The Agent arrangement has been used by two ERICs, enabling contracting to take place in the name of and on behalf of an ERIC by a named third party. Key issues arising for contracting activities with the status of 'open questions' relates to the practice of ERICs jointly procuring services or a responsible body.

The ERIC Regulation provides for procurement policies and ERICs have developed arrangements in accordance with the broad policies, elaborated within Rules of Procedure. Deliverable 3.2 of Work Package 3 (*Report and recommendations on VAT exemptions in the ERIC legislation*) has considered state of the art goods purchase procurement rules for ERICs activities and the range of tendering activities that can be undertaken.

4.2 ERICs and contracting – legal aspects

The ERIC legal framework provides an ERIC with legal personality and capacity recognised in all EU Member States and with the flexibility to adapt to the specific requirements of each infrastructure. Having legal personality means that it can enter into contracts.

Particular arrangements for contracting are not provided for in the ERIC Regulation; provisions relating to contracting are thus not 'essential elements' of Statutes but the requirements relating to the development of a procurement policy are categorised as 'essential element'.

Box 3 Essential elements of the Statutes

Article 10 Statutes

The Statutes of an ERIC shall contain at least the following:

- (a) a list of members, observers and, where applicable, of entities representing members and the conditions of and the procedure for changes in membership and representation in compliance with Article 9;
- (b) the tasks and activities of the ERIC;
- (c) the statutory seat in compliance with Article 8(1);
- (d) the name of the ERIC in compliance with Article 8(2);
- (e) the duration, and the procedure for the winding-up in compliance with Article 16;
- (f) the liability regime, in compliance with Article 14(2);
- (g) the basic principles covering:
 - (i) the access policy for users;
 - (ii) the scientific evaluation policy;
 - (iii) the dissemination policy;
 - (iv) the intellectual property rights policy;
 - (v) the employment policy, including equal opportunities;
 - (vi) the procurement policy respecting the principles of transparency, non-discrimination and competition;**
- (vii) a decommissioning, if relevant;
- (viii) the data policy;
- (h) the rights and obligations of the members, including the obligation to make contributions to a balanced budget and voting rights;
 - (i) the bodies of the ERIC, their roles and responsibilities and the manner in which they are constituted and in which they decide, including upon the amendment of the Statutes, in compliance with Articles 11 and 12;
 - (j) the identification of the working language(s);
 - (k) references to rules implementing the Statutes.

The Statutes shall be publicly available on the website of the ERIC and at its statutory seat.

4.3 ERICs Responses/Key issues

As noted above, Article 7 of the ERIC Regulation provides that, inter alia, An ERIC shall have in each Member State the most extensive legal capacity accorded to legal entities under the law of that Member State. It may, in particular, acquire, own, and dispose of movable, immovable and intellectual property, conclude contracts and be a party to legal proceedings.

ERICs, as provided for in the ERIC Regulation, are empowered to develop specific procurement arrangements.

Recital 21 of the ERIC Regulation (Regulation 723/2009) notes

Since an ERIC is established under Community law, it should be governed by Community law, in addition to the law of the State where it has its statutory seat. However, the ERIC could have a place of operation in another State. The law of that latter State should apply in respect of specific matters defined by the Statutes of the ERIC. **Furthermore, an ERIC should be governed by implementing rules complying with the Statutes** (emphasis added).

This is further explicated in *Article 15 Applicable law and jurisdiction* in terms of the setting up and internal functioning of the ERIC. Article 1.10 provides that

In order to permit an efficient procedure for the setting up of an ERIC, it is necessary for the entities willing to set up an ERIC to submit an application to the Commission which should assess, with the help of independent experts, whether the proposed research infrastructure is in conformity with the Regulation. Such an application should contain a declaration of the host Member State recognizing the ERIC as an international body or organisation for the purpose of the application of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax [...] and Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products [...], as of its setting up. The ERIC **should also benefit from certain exemptions as an international organisation for the purpose of applying Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [...] in conformity with State aid rules.** (emphasis added)

‘Procurement’ is directly addressed in the Statutes of the ERICs. In general, the Statutes include formulations exemplified by those presented as follows:

Article 11 Procurement Policy The ELI ERIC DG shall define a procurement policy to be approved by the GA. This procurement policy shall respect the principles of transparency, proportionality, mutual recognition, equal treatment, competition and non-discrimination. (ELI ERIC)

Article 14 Procurement ECRIN-ERIC shall treat procurement candidates and tenderers equally and without discrimination, regardless whether or not they are based within the European Union. The ECRIN-ERIC procurement policy shall respect the principles of transparency, non-discrimination and competition. Detailed rules on procurement procedures and criteria are defined in the Internal Rules of Procedure.

In other ERICs, procurement is treated together with tax exemptions; for example, BBRMI ERIC: Article 6

Procurement and Tax Exemption

“1. BBMRI-ERIC shall treat procurement candidates and tenderers equally and without discrimination, regardless whether or not they are based within the European Union. The BBMRI-ERIC procurement policy shall respect the principles of transparency, non-discrimination and competition. Internal rules on procurement procedures and criteria shall be adopted by the Assembly of Members.

2. Freedom from taxation based upon Articles 143(1)(g) and 151(1)(b) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (1) and in accordance with Articles 50 and 51 of Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying

down implementing measures for Directive 2006/112/EC on the common system of value added tax (2) shall be limited to the value added taxes for such research and development goods and services which are:

- (a) in direct relation to the management and services of BBMRI-ERIC; and
- (b) closely related to the aims and activities laid down in Article 3; and
- (c) benefiting the entire scientific community; and
- (d) exceeding the value of EUR 250; and
- (e) wholly remunerated and procured by BBMRI-ERIC.

3. Procurement by individual members shall not benefit from tax exemptions. No further limits shall apply.”

Contracting activities relates to the provision of goods and services by third party providers. Goods include equipment - and parts. Services range from legal to administrative services. An overview of response to the questions on contracting (survey 2019.2020) indicates the key features relating to contracting in ERICs.

Contracting
<p>Nearly all ERICs reported that have entered into contractual arrangements for the provision of goods and services (16/18).</p> <p>Supplies for legal, IT, accounting and auditing and communication services were among the services procured. Research services have also been procured by ERICs.</p> <p>Suppliers are drawn from SMEs, multi-national organisations as well as natural persons or individuals acting as consultants.</p> <p>For two ERICs, it contracts on behalf of the nodes. (The VAT exemption is thereby applied). For four ERICS, the nodes conclude the contracts themselves.</p> <p>Three ERICs engaged expert input to support contracting arrangements.</p>

ICOS ERIC reported a broad split between suppliers providing goods and those providing services. Suppliers provide legal services, IT-services, accounting and auditing services, communication services, health services, IT-equipment, office supplies.

ERICs reported varied levels of contracting; some engage several suppliers, others, a minimal number of suppliers:

“The ERIC only contracts limited administrative services. The distributed ECCSEL facility owners/providers contract scientific/technical products and services”. (ECCSEL ERIC)

Figure 1 Presents an overview of the supplies contracted by ERICs.

Figure 1 Category of supplies contracted by 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 services sought included were broadly presented as 'consultancy'. Goods supplied include 'office supplies' but also computing hardware.

The suppliers range from individual consultants (European Social Survey ERIC), to universities/research institutes (BBMRI ERIC), SMEs (DARIAH ERIC); Survey agencies (SHARE ERIC and European Social Survey ERIC, these contracts range in size).

CLARIN ERIC: Facilities and services for organising the annual conference and other events and technical suppliers to keep the infrastructure running (automation costs).

EATRIS ERIC: Project managers Legal advisors Employee benefit and insurance advisors

INSTRUCT ERIC: Insurance, premises, utilities, computing hardware and software, HR services, legal services, accounting services

CERIC ERIC: Tax/legal/fiscal consultants; labour consultants; technical consultancies

ERICs have, for instance ESS ERIC (social) procurement documents, such as Conditions of Purchase, available on a dedicated Procurement page of its website.

The value of the contract and the duration of contracts varies. ERICs were asked whether they engaged external services for dealing with contracting issues. 6 ERICs reported that they had engaged such services. 10 of the 18 ERICs responding to the survey indicated that a designated member of staff deals with contracts.

A key issue arising for ERICs and for their efficient and effective implementation is whether, given the commonality of services required, particularly as regards HR, insurance, legal, conference facilities et cetera, a system whereby the procurement of suitable suppliers for use by all ERICs could be established. Alternatively, the question arises as to whether ERICs could jointly procure goods and services.

The role of the ERIC Forum, a grouping that is not a recognized legal entity, could be further examined in terms of its role in supporting joint/cross-ERIC procurement.

4.4 Actions/Best practices

As noted, ERICs routinely enter into contracts with a range of suppliers. The manner in which they do so is governed by the procurement policy of an ERIC. Best practice examples ensure the alignment of contractual clauses with all aspects of an ERIC's operations.

Contracts with member institutions/nodes:

ERICs have developed contractual agreements for use with its member institutions who act as service providers; for example:

- CESSDA ERIC has developed a dedicated Service Level Agreement;
- EATRIS ERIC has developed its own EATRIS Framework Agreement for member institutions' as service providers
- CLARIN ERIC's nodes are organized by means of national consortia in each member or observer country. This relationship between CLARIN ERIC and its nodes is laid down in the CLARIN Agreement;
- European Social Survey ERIC developed a Linked third Party Agreement for use by its Core Scientific Team CST Institutions in EU RTD projects in which the ESS ERIC is a beneficiary;
- SHAREERIC has similarly developed a Consortium Agreement for use with the partner institutions outside the ERIC.
- ECRIN ERIC has developed contract templates in the context of highly regulated clinical research environment.

Individual ERICS may agree to share these legal documents.

Contracts with users

There are a range of agreements in place relating to arrangements between an ERIC and its users.

Recalling the definition of a research infrastructure with ERIC status¹⁰, most ERICs include a statement on Conditions of Use (e.g. European Social Survey ERIC); some ERICs have Transnational Access Agreements, such as EMSO ERIC. Others include:

- EMSO ERIC - Transnational Access Agreement
- ECCSEL ERIC - offers full open access and funded access. <https://eccsel.org/about-eccsel/how-to-apply/>
- EU OPENSREEN ERIC - In its Rules of Procedure (2020) it provides that the following will hold: Partner Sites shall include the EU-OPENSREEN ERIC's requirements into their contracts with their Users.

3.5 Key messages for new and existing ERICs

Issues identified by ERICs include:

- * the need for standard clauses for different contracts
- * the need to recognise data protection matters arising for extra EU/EEA contracts.
- * Further exploration of contracting on behalf of nodes.
- * Include these costs in budget of an ERIC.

For those ERICS that are employing entities, it is important to define appropriate Implementing rules related to the Personnel selection criteria, publicity, requirements.

The contractual requirement and the reference to the appropriate collective contracts framework is also a key issue which may take time given the uncertainties regarding the classification of the Entity (private/Public/ Non profit/ International?). EMSO ERIC decided to go for International Entity status and this was a wise decision (EMSO ERIC email communication December 2021).

¹⁰ 'research infrastructure' means facilities, resources and related services that are used by the scientific community to conduct top-level research in their respective fields and covers major scientific equipment or sets of instruments; knowledge-based resources such as collections, archives or structures for scientific information; enabling Information and Communications Technology-based infrastructures such as Grid, computing, software and communication, or any other entity of a unique nature essential to achieve excellence in research. Such infrastructures may be 'single-sited' or 'distributed' (an organised network of resources); (art 2, Definitions)

ERICs need to address the challenge of having all policies aligned so that, for example, employment clauses do not inhibit innovation/creativity (European Spallation Source ERIC).

3.6 Strategy – contracting

Contracting by ERICs is linked to the wider policies on procurement developed by an ERIC. Contracting is undertaken for the supply of goods and services. 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.

A recommendation arising from the consideration of contracting in ERICs is that through the ERIC Forum, ERICs should explore the possibility of jointly contracting suppliers.

The establishment of an ERIC Framework could 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 – is an arrangement where the buyer selects suppliers and sets terms and prices for a period in advance – often as much as four years in the future – and then calls on the suppliers to deliver the specification.¹¹)

¹¹ <https://www.trackerintelligence.com/public-sector-procurement/procurement-frameworks/#:~:text=A%20procurement%20framework%20%28or%20public%20sector%20framework%29%2C%20more,the%20suppliers%20to%20deliver%20the%20specification%20when%20required.>

Section 5 Conclusions and ERIC Forum Recommendations

Increasing the exchange of best practices (ERIC Forum Toolbox)

- As part of the future ERIC Forum toolbox, Work Package 3 of the ERIC Forum project foresees the setting up of a repository of documents (statutes, policies, templates, etc.).
- Based on this deliverable's observations, a checklist of all aspects to be considered in relation to an assessment of IP and related rights; to risk assessment and related insurance requirements and for examples of Rules of Procedure, could be assembled and made available to the Forum via the Toolbox in 2022

Lessons/Best Practice

The main lessons arising that inform best practices in ERICs in relation to the three topics are summarized:

- 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. It is noted that the issue of insurance and liability of members is currently being considered by the Swedish Research Council representing Sweden in a number of ERICs. Its report is in preparation at time of writing and no doubt recommendations relating to the insurance of national representatives will be included.
- 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.

Outstanding/open questions

The main open questions – and possible solutions – are:

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. Is 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.

Recommendations

Three recommendations arise:

- (1) In relation to contracting, in recognition that the costs of goods and supplies may be lowered where ERICs work together to purchase goods and services, the recommendation is that ERIC Forum further explores the possibility of jointly contracting a supplier. This may include consideration of the establishment of an ERIC procurement Framework.
- (2) In relation to insurance the recommendation is that the ERIC Forum consider 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) In relation to Intellectual Property, it is recommended that 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.

Further elaboration of best practices will occur in Work Package 5 *Communication and Dissemination*.

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

ERIC	Rules of Procedure and if publicly available Or Procurement/Terms and Conditions	Dedicated Policies
BBMRI	file:///C:/Users/sbbd209/Downloads/Annex%203-%20Rules%20of%20Procedure.pdf	
CERIC	https://www.ceric-eric.eu/project/ramiri-handbook/ramiri-handbook-index/	
CESSDA	Rules include Procurement Rules (2019) https://www.cessda.eu/About/Governance/Procurement-rules (IP on page 5, exceptions)	https://www.cessda.eu/About/Branding-guidelines https://www.cessda.eu/content/download/5813/62634/file/CESSDA%20Trademark%20usage%20guidelines.pdf
CLARIN		details on copyright law: https://www.clarin.eu/content/clc-overview-copyright-law
DARIAH	https://www.dariah.eu/wp-content/uploads/2020/11/IRP-Version-November-2020.pdf	
EATRIS	https://eatris.eu/wp-content/uploads/2016/04/20170420_EATRIS_General-Terms-and-Conditions-1.pdf	
ECCSEL		How to apply for access: https://eccsel.org/about-eccsel/how-to-apply/
ECRIN	ECRIN- ERIC INTERNAL RULES OF PROCEDURE	
ELI	[States definition RoP, implementing rules: EUR-Lex - 32021Y0615(01) - EN - EUR-Lex (europa.eu)	
EMBRC		Access and benefit sharing: https://embrc.eu/services/access-and-benefit-sharing
EMSO	Business Plan http://www.emso-eu.org/site/old-website/images/documents/business%20plan/EMSO%20BP_January%202014_CLEAN_public.pdf	

EPOS		Data Policy https://www.epos-eu.org/sites/default/files/2020-12/EPOS%20DATA%20POLICY_July2018.pdf
ESS ERIC (Social)	Procurement: ESS ERIC conditions of purchase APRIL-2021.pdf (europeansocialsurvey.org)	No specific policies elaborated
EU OPENSREEN	https://www.eu-openscreen.eu/fileadmin/user_upload/newsroom_and_downloads/EU-OPENSREEN Rules of Procedure 03 09 2020 2.pdf (Art 9 Intellectual Property Rights)	
EURO Argo*		Use of APIs Argopy
Euro BioImaging		Collaborations Terms of use: https://www.eurobioimaging.eu/about-us/document-gallery
ESS ERIC (Spallation)	Code of Conduct and policies: https://europeanspallationsource.se/legal-ip#documents-policies	ESS Intellectual Property Rights and Inventions Policy https://europeanspallationsource.se/sites/default/files/downloads/2017/09/ESS%20IPR%20and%20Inventions%20Policy.pdf
ICOS		Data Policy ICOS RI Data Policy.pdf See also Employment Policy
INSTRUCT		Branding Guidelines Instruct IPR Policy 2013 InstructIPpolicy201113 JDoh (2).pdf
JIV	Rules of Procedure (Not publicly available)	Data access: https://www.evlbi.org/evn-data-access
LIFEWATCH	https://www.lifewatch.eu/wp-content/uploads/2021/03/LW-ERIC-GA_RULES-OF-PROCEDURE.pdf	
SHARE ERIC		http://www.share-project.org/data-access/share-conditions-of-use.html citation rules: The Survey of Health, Ageing and Retirement in Europe (SHARE): Citation Requirements (share-project.org)

Source: Task 3.6, all websites accessed 6.12.2021

Annex 2 Mapping IPRs – Overview of IPRs

IP rights in a nutshell

IPR	What for?	Duration of protection	Priority	Routes to registration
Trade marks	Distinctive signs	Renewable indefinitely for periods of 10 years	6 months	National EU trade mark (EU) Madrid System
Industrial designs	Appearance of products	RCD: renewable every 5 years up to 25 years UCD: 3 years, not renewable	6 months	National Community design (EU) Hague System
Patents	Inventions	20 years	12 months	National European Patent (EPC) PCT
Utility models	Inventions	7-10 years	12 months	National
Trade secrets	Confidential business information	Unlimited	No	None
Copyright	Literary, scientific and artistic works Neighbouring rights (media or related rights)	Moral rights: no time limit Economic rights: at least the author's lifetime + 50 years (in the EU, 70 years from the author's death) Neighbouring rights: at least 20 years from the end of the year in which the fixation was made or the performance / broadcast took place (in the EU, 50 years instead of 20 for phonograms and performances)	No	None
Databases	Collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible	Copyrighted databases: within the EU: life of the author + 70 years Sui generis databases: 15 years from the end of the year in which the making of the database was completed or in which the database was first made available to the public	No	Copyrighted databases: automatic <i>Sui generis</i> databases: EU right only
Domain names	Internet addresses	Renewable indefinitely for periods of a maximum of 10 years	No	Worldwide protection when registered at any accredited registrar
Geographical indications	Products having a specific geographical origin and whose qualities and/or reputation are attributable to that origin	Unlimited	No	National EU Lisbon System

Source: European IP Helpdesk (2019) *Your Guide to IP in Europe*. European Union: Luxembourg

Table 2 Mapping Intellectual property rights in ERICs

Potential IP	Ideas invention	Information	Music, literature, art	Software	Process	Industrial material	Device	Branding	Cell culture	Plant
Patent										
Trade Secret										
Copyright										
Design rights										
Database rights										
Trademark										
Trade dress/unfair competition										
Domain name										
Plant variety										
Plant patent										

Source: Amended - Johnson 2015:275 Fig 16.2 What are you trying to protect?¹²

¹² S Johnson, *Guide to Intellectual Property: What it is, how to protect it and how to exploit it* (Profile Books Ltd, London 2015) 275