

marinerg-i

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Specific Legal Requirements – Core MARINERG-i Activities

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Abbreviations

IP	Intellectual Property
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MARINERG-I

EXECUTIVE SUMMARY

This report (Deliverable 5.3) explores a number of the core legal issues relating to the projected core activities of the MARINERG-i ERIC.

The issues identified relate to: (1) the management of human resources; (2) dealing with intellectual property (such as patents, copyright, trademarks, etc); (3) the legal framework relating to the procurement of goods, services and works by the MARINERG-i ERIC; and (4) guidance on the likely general liabilities of MARINERG-i ERIC.

As the geographical locations of the various MARINERG-i ERIC entities have not been established, the issues have been dealt with in this Deliverable in general terms. The ERIC will need to obtain country-specific guidance on these issues as and when the geographic location of the MARINERG-i ERIC entities has been decided.

Examples for the UK and Ireland have been included for illustrative purposes only. Please note that this document is not intended to provide legal advice in respect of either jurisdiction, as any legal advice will be subject to the particular factual circumstances. In addition, the examples given for Ireland have not been provided by a lawyer qualified in Ireland.

Future deliverables in this Work Stream relate to the legal obligations for Node MARINERG-i activities, and preparation of draft legal documentation.

1. INTRODUCTION

Prior to establishing itself as a new entity, MARINERG-i ERIC should understand and evaluate a number of legal issues relating to different parts of MARINERG-i ERIC's activities which, if not addressed and dealt with adequately, could expose MARINERG-i ERIC to some level of risk.

This report sets out the key legal issues which should be considered and discussed by Consortium members prior to setting up the MARINERG-i ERIC:

- **Human Resources** issues: related to MARINERG-i ERIC's hiring of employees, focusing on aspects which MARINERG-i ERIC will need to consider as part of its relationship with its employees;
- **Procurement** issues; MARINERG-i ERIC will need to procure a wide range of goods and services, from commodity office and business supplies to specialist goods and services associated with the specialist activities of the ERIC. This section explores the legal framework which will apply to purchasing by MARINERG-i ERIC;
- **Intellectual Property** issues: which largely relate to: (i) IP currently owned by ERIC members and third parties separately to MARINERG-i ERIC, but from which MARINERG-i ERIC could benefit; and (ii) IP developed by MARINERG-i ERIC and/or its members as part of the activities of the ERIC, once it has been set up;
- **General Liability** issues: other issues touching on the general liability of MARINERG-i ERIC, including: (i) liability for injury to employees and visitors on any sites controlled by MARINERG-i ERIC; (ii) ensuring that MARINERG-i ERIC has adequate security measures in place to protect both its own and third party data; and (iii) issues surrounding sovereign immunity of vessels (to the extent that this may be relevant to MARINERG-i).

2. LEGAL CONSIDERATIONS FOR HUMAN RESOURCING

2.1 General

2.1.1 MARINERG-i ERIC will need personnel in order to operate and will become exposed to a range of legal issues associated with the management of these personnel. These personnel may be categorised as employees of MARINERG-i ERIC, or self-employed contractors or consultants providing services to MARINERG-i ERIC.

2.2 Information on the different categories of workers – employees, self-employed, worker

2.2.1 MARINERG-i ERIC will need to establish the basis on which it will employ or otherwise engage its staff. For example, UK law distinguishes between "employees", "workers" and the "self-employed" and the rights, obligations and protections that apply will depend on the nature of the relationship between the staff member and MARINERG-i ERIC.

2.2.2 MARINERG-i ERIC will need to be mindful of the differences in legal protection between the services of employees (both permanent and fixed-term), self-employed contractors and agency-workers:

2.2.2.1 Employees have the most comprehensive protection in most jurisdictions. In most jurisdictions, employees have a number of

statutory rights and protections including the right not to be unfairly dismissed, the right to redundancy payments, the right to a statutory minimum period of notice of the termination of the employment, the right to take maternity/paternity/parental/adoption leave, the right not to be objected to unlawful discrimination and the right to request flexible working. MARINERG-i ERIC will therefore need to ensure that it has adequate policies in place which reflect the jurisdictional requirements for these rights.;

2.2.2.2 Self-employed contractors or consultants can cause difficulties in that care should be taken to ensure that the nature of the relationship justifies the name given to it. A concern in the UK is to avoid contractors being deemed "de facto" employees, who thereby acquire employment protection rights and create tax liabilities by virtue of the substance of their relationship with the hirer. The following features are taken into account when evaluating the employment status of an individual:

- (a) the extent of the personal service which is being provided. The question will be whether a specified individual is expected to undertake the services or whether a substitute can be deployed. In general terms, the greater level of personal service which is offered by the individual the more likely they are to be considered an employee;
- (b) the mutuality of obligation. If MARINERG-i ERIC is obliged to provide work and the individual is obliged to accept that work then the greater the risk that the individual will be considered an employee; and

the extent to which MARINERG-i ERIC controls the individual's work will be relevant, with a greater degree of control suggesting that the individual is an employee;

2.2.2.3 In most jurisdictions regulations exist to govern: (i) the relationships between employment agencies/businesses and hiring principals (MARINERG-i ERIC in this instance); and (ii) the hiring of agency workers. The rights of agency workers will depend on a number of factors and the relevant jurisdiction. For example in the UK temporary agency workers will: (i) enjoy the right to the same pay and other "basic working conditions" as equivalent permanent staff after a 12 week qualifying period; and (ii) have access to collective facilities and to information about employment vacancies from day one of their assignment. MARINERG-i ERIC will also need to be mindful of any obligations to the relevant tax authorities for engaging workers through temporary work agencies;

2.2.2.4 Employees may also be engaged on definite/fixed-term contracts and/or on part-time hours. In most jurisdictions there will be a requirement for such employees to have the right not to be treated less favourably than comparable permanent or full-time employees in relation to the terms of their contract or by being subjected to

any other detriment. In the UK the consortium would only be able to treat fixed-term employees or part-time workers less favourably where such treatment can be objectively justified. ;

2.2.2.5 In the UK, fixed-term employees will be deemed to be permanent employees if they have been employed under successive fixed-term contracts for four or more years, unless the use of another fixed-term contract can be objectively justified by the employer. Moreover, in the UK the non-renewal of a fixed-term employment contract will constitute a dismissal at law by MARINERG-i ERIC and the applicability of any legal protections on termination would then need to be considered.

2.2.3 MARINERG-i ERIC will need to ensure that it has in place effective contracts for these different categories of staff and ensure that these are compliant with local legislation.

2.3 National Minimum Wage legislation and industry pay norms

2.3.1 There are national minimum wage rules in most jurisdictions and for the most part the rate of pay that applies to a worker will depend on the worker's status and age. By way of example, in Ireland the national minimum wage for most experienced adult employees is €9.55 per hour (as of 1 January 2018);

2.3.2 In the UK there are different rates of pay for apprentices, under 18s, employees aged 18 to 20, employees aged 21 to 24 and employees aged 25 and over. These rates are generally reviewed by the Government each year. In Ireland, as in the UK, there are different rates of pay for employees under the age of 18 and employees who are in the first year of employment since reaching the age of 18;

2.3.3 MARINERG-i ERIC will need to ensure it is compliant with the relevant minimum wage levels in each country where it has activities, especially where apprentices or work-experience students are hired;

2.3.4 MARINERG-i ERIC will also need to consider any industry pay norms which may be relevant in the applicable jurisdictions. For countries where collective bargaining agreements are prevalent there may be minimum rates of pay for certain individuals or types of role which will need to be complied with.

2.4 Holiday entitlement

2.4.1 Regardless of jurisdiction all workers will have the statutory right to a level of paid annual leave. MARINERG-i ERIC will need to take account of the different minimum levels of that annual leave. For the UK there is a statutory right to a minimum of 5.6 weeks' paid annual leave (equivalent to 28 days for a full-time employee). This entitlement includes public and bank holidays. The entitlement will vary considerably across Europe (particularly with regard to the number and frequency of public and bank holidays) and so adequate policies and procedures should be in place to reflect this. Most organisations offer their employees holiday entitlements in excess of statutory minimums, for example in the UK many organisations will offer 25 days holiday plus the usual bank holiday days;

- 2.4.2 Both fixed-term and part-time workers are usually entitled to a pro-rated annual leave entitlement;
- 2.4.3 For those individuals who are genuinely self-employed there are no minimum holiday entitlements which they are entitled to;
- 2.4.4 In the UK employees are entitled to be paid at a rate of one week's pay for each week of leave. However, the question of what constitutes a week's pay is a complex area, derived from EU law, and has been the subject of extensive litigation in the UK, with the current position being that certain elements of variable pay such as certain overtime and commission payments should be accounted for in holiday pay calculations. This is a fast evolving area of law, the developments of which MARINERG-i ERIC should be aware of when considering its payroll processes for paying holiday pay;
- 2.4.5 Whether MARINERG-i ERIC will be able to pay their employees in lieu of their statutory annual leave entitlement (except on termination of employment when it is usually required that any accrued but untaken leave be paid in lieu) will depend on the jurisdiction. It is not permitted in the UK or in Ireland.

2.5 Rules on working hours and overtime

- 2.5.1 Each jurisdiction that MARINERG-i ERIC has operations in will have a maximum number of weekly working hours for workers which will need to be complied with;
- 2.5.2 For the UK the maximum number of weekly working hours for workers is 48 hours on average over a 17 week reference period. However, the maximum working week does not apply to all workers, e.g. certain management posts and workers may also opt-out of the limit if they so choose. In Ireland, the maximum number of weekly working hours for workers is also 48 hours, subject to certain exceptions.
- 2.5.3 Even if workers opt-out of the limit on maximum weekly working hours, MARINERG-i ERIC will need to ensure that appropriate daily and weekly rest periods are adhered to. In the UK and Ireland the amount of designated rest time will depend on whether the employee is an "adult worker" or a "young worker".
- 2.5.4 If MARINERG-i ERIC will have employees who are employed as night workers then it will need to consider whether any additional protection is afforded to them, as is the case in the UK . In the UK a night worker is any person who works for at least three hours during "night time" on the majority of their shifts or does so "as a normal course". In Ireland a night worker is any person who works for at least three hours between midnight and 7am, and who works at night for at least half of their annual work.

2.6 Local employing entity

- 2.6.1 MARINERG-i ERIC will need to establish, for each country where it will have operations, whether a local employing entity is required to be set up or whether the overseas company could employ local workers. A local company will usually be required where an employee needs a visa in order to work in

that country. This issue will present local tax law issues and so tax advice will be imperative for each jurisdiction when making this assessment;

2.6.2 Other considerations for employing individuals who will work in other countries are:

2.6.2.1 to review the tax and tax withholding position;

2.6.2.2 review the social security position; and

2.6.2.3 determine how and where pay should be delivered to the employee.

2.7 Rules on sick pay and sick leave

2.7.1 MARINERG-i ERIC will need to implement sickness absence policies which are in accordance with the relevant legislation for each country that MARINERG-i ERIC has activities in. The policies should set out appropriate reporting requirements for when employees are sick and any necessary trigger points for any capability or long-term sickness procedures which would need to be followed;

2.7.2 In the UK if an employee is unwell and cannot attend work, they will be entitled to statutory sick pay ("SSP") provided they meet the eligibility requirements. Some employees will not qualify for SSP based on their earnings, but they may qualify for other state sickness benefits. In Ireland it is generally at an employer's discretion whether to provide their own policy on sick pay and this is usually captured in the contract of employment; and

2.7.3 MARINERG-i ERIC will need to make a decision on whether it will elect to enhance any SSP for employees and, if so, set out in their employment contracts that employees will receive their usual pay for a specified number of days in a consecutive 12 month period.

2.8 Rules on notice and termination

2.8.1 Depending on the jurisdiction, there will be different minimum notice entitlements for employees which should be adhered to when terminating employment, except where a summary dismissal is appropriate, in situations involving gross misconduct – where no notice is required;

2.8.2 The concept of an "employment at will" relationship, where an employer may terminate the employment of an employee at any time for any reason, which is common in the US, does not exist under English law. In the UK and Ireland, if MARINERG-i ERIC requires an employee's contract to be terminated it will need to serve the employee with the requisite notice period under their contract of employment, which will need to be at least the statutory minimum;

2.8.3 MARINERG-i ERIC may wish to have different minimum notice periods for different employees, depending on their seniority. For example, for particularly senior and highly-skilled employees, it would be prudent to have longer notice periods (3 to 12 months) in order to allow for adequate succession planning of key staff and to keep them out of the market, compared to more junior staff

where (subject to the statutory minimum notice) notice periods of between one to three months are more usual;

- 2.8.4 There may be situations where MARINERG-i ERIC will require alternatives to serving notice, such as garden leave or to pay in lieu of their notice. In order for such alternatives to be viable, the appropriate contractual provisions will need to be included in the contract;

2.9 Collective Bargaining Agreements, Works Councils & Trade Unions

- 2.9.1 Collective agreements are less common in the UK than in mainland Europe and they usually exist in more traditional industries or in the public sector where union recognition is more prevalent. Collective agreements in Ireland are generally not binding to the employment relationship unless the collective agreement is expressly incorporated into the contract of employment. In any event MARINERG-i ERIC should be aware of any applicable collective agreements which may apply to its workforce in different jurisdictions;

- 2.9.2 Trade union membership has been decreasing in the UK but unions do still perform an influential role in certain industries (e.g. transport, health service, retail or education) particularly where they are "recognised" by the employer for collective bargaining purposes. In other parts of Europe trade union membership may be more of an issue for MARINERG-i ERIC. In such circumstances, MARINERG-i ERIC should be aware that trade union members can be entitled to a number of enhanced protections, for example in the UK:

- 2.9.2.1 protection from less favourable treatment on the grounds of their membership;

- 2.9.2.2 time off work to participate in union activities;

- 2.9.2.3 protection from any deduction of excessive or unauthorised union subscriptions from their wages; and

- 2.9.2.4 to vote in a strike ballot (trade unions are able to call a strike but they must follow a specific prescribed procedure in order for the strike to be lawful).

- 2.9.3 Employees may also benefit from collective rights under the Information and Consultation of Employees Regulations 2004 ("ICE") which apply to businesses with more than 50 employees, and give employees the right to request that their employer informs and consults them about issues within the organisation. Under ICE, UK employers may, and in some cases must, put in place an information and consultation agreement ("I&C agreement") governing how they will consult their workforce about economic and employment-related matters;

- 2.9.4 The ICE does not require the formal setting up of a 'works council'; employers can either establish an I&C agreement voluntarily, or employees can submit a formal request for an I&C agreement, although the request must be made by the greater of either 15 employees or 10% of employees to trigger an obligation on the employer to begin negotiations for an I&C agreement;

- 2.9.5** If parties do not reach a negotiated I&C agreement, the 'standard provisions' of the ICE will apply. These standard provisions set out the following areas on which an employer is obliged to inform and consult its employees:
- 2.9.5.1** the business' economic situation;
 - 2.9.5.2** employment prospects;
 - 2.9.5.3** decisions likely to lead to substantial changes in the work organisation or contractual relations.
- 2.9.6** With regard to Europe-wide consultation procedures between employers and their employees, the Transnational Information and Consultation of Employees Regulations 1999 ("TICE") apply in a similar manner to the ICE but to "Community scale" companies or groups of companies where their central management is in the UK (i.e. the company has at least 1,000 employees within the EU and at least 150 employees in each of two member states). Companies subject to these regulations must have either a European Works Council (EWC) or an equivalent mechanism (e.g. an I&C agreement) which allows for information to be provided to the entire workforce across the EU and for them to be consulted on relevant employment-related matters. If an employer fails to establish an EWC agreement within three years of a valid request, onerous default model EWC provisions will apply.

2.10 Immigration requirements

- 2.10.1** MARINERG-i ERIC will need to check that its employees have the right to reside and work in the relevant country. In the UK, a fine of up to £20,000 per worker can be imposed on an employer who negligently hires an illegal worker. If an employer employs an individual who they had "reasonable cause to believe" is an illegal worker, they will commit a criminal offence, punishable by an unlimited fine or up to five years in prison;
- 2.10.2** The issue of Brexit may cause additional immigration obstacles as rights set out in the EU Treaties shall cease to apply to the UK following the UK's formal withdrawal from the EU (which is likely to take effect in March 2019) and any subsequent transition period. This is likely to affect current and future workers from the EU who are working in the UK, and UK nationals working for MARINERG-i ERIC within other EU countries, who may be subject to similar and reciprocal restrictions on working rights. If MARINERG-i ERIC will have an international workforce it will need to be prepared to respond swiftly to any developments;
- 2.10.3** Any Brexit agreement between the UK and the EU will be relevant in this context. As between Ireland and the UK, it should be noted that it was confirmed in December 2017 that the Common Travel Area between the UK and Ireland will not be impacted by Brexit¹, however this issue should be kept under review by the MARINERG-i ERIC to the extent that it becomes relevant. The Common Travel Area facilitates the free movement of people between the UK and Ireland and is not dependent on membership of the EU;

¹ Citizens' Rights – UK and Irish Nationals in the Common Travel Area, Guidance published on 22 December 2017. <https://www.gov.uk/government/publications/citizens-rights-uk-and-irish-nationals-in-the-common-travel-area/citizens-rights-uk-and-irish-nationals-in-the-common-travel-area>.

- 2.10.4 Overall, MARINERG-i ERIC will need to ensure that appropriate visas and authorisations are in place before allowing employees to work in certain jurisdictions.

2.11 Rules on pensions

- 2.11.1 MARINERG-i ERIC will need to comply with any minimum rules on pensions for its employees. In the UK there is an obligation on employers to automatically enrol eligible workers in a pension scheme. In Ireland, the requirements are potentially less onerous however the Irish Government announced a major reform of future State, private and public service pension provision and this should therefore be kept under review to the extent it is relevant for the MARINERG-i ERIC. MARINERG-i ERIC would be able to use an existing or new occupational pension schedule or qualifying personal pension scheme, provided the scheme meets certain statutory requirements. Alternatively, it may wish to enrol eligible jobholders in NEST, a central scheme set up by the Government;
- 2.11.2 Whilst an employee is an active member of any such scheme MARINERG-i ERIC will have an obligation to pay a minimum level of pension contributions; and
- 2.11.3 Different rules on pensions will apply in MARINERG-i ERIC's applicable jurisdictions and it will therefore need to bear in mind any minimum contribution levels which may apply.

2.12 Family-friendly working arrangements

- 2.12.1 MARINERG-i ERIC will need to consider the varying family-friendly rights for its employees across its relevant jurisdictions;
- 2.12.2 The rights on leave and pay for mothers and fathers/partners is different in each country, but, generally MARINERG-i ERIC will need to put into place effective policies and processes for maternity, paternity (partner), adoption and shared parental (where applicable) leave;
- 2.12.3 In the UK and Ireland there are also other family-friendly rights, such as: parental leave; emergency time off for dependants; and flexible working applications, which MARINERG-i ERIC would be obliged to give proper consideration to, where certain conditions are met.
- 2.12.4 Other jurisdictions will have equivalent or supplemental family-friendly rights which would require attention and implementation through policies;
- 2.12.5 MARINERG-i ERIC would need to take into consideration that any disparity in maternity, paternity and shared parental pay could give rise to indirect discrimination claims and so if there is an intention to offer enhanced packages to employees, MARINERG-i ERIC will need to be consistent in its approach within each jurisdiction.

2.13 Insurance

- 2.13.1 MARINERG-i ERIC will need to ensure that the appropriate insurance policies relevant to its activities are in place and the premiums paid;
- 2.13.2 As an employer in the UK or Ireland MARINERG-i ERIC would need to take out minimum levels of employers' liability insurance and public liability insurance;
- 2.13.3 Similar and/or additional insurance policies in other jurisdictions may be relevant and need to be taken out and maintained. Some will be mandatory depending on the country and others just advisable but good practice to implement;

2.14 Protection of confidential information and IP

- 2.14.1 MARINERG-i ERIC will need to consider the appropriate clauses to insert into service agreements and employment contracts for both its senior management team(s) and general employee population;
- 2.14.2 As an organisation which will generate a considerable amount of IP and confidential information through its activities, appropriate measures will need to be adopted to protect such intangible assets;
- 2.14.3 Consideration will need to be given to provisions which are included within, not only employment contracts, but also contracts with sub-contractors and other "workers". Measures to be implemented within the agreements include: (i) post-termination restrictions; (ii) express IP assignments and licences and (iii) confidentiality clauses;
- 2.14.4 Post-termination restrictive covenants in the UK are, on the face of it, void as an unlawful restraint of trade, unless they go no further than is reasonably necessary to protect one or more of the employer's legitimate business interests, such as an interest in trade secrets, confidential information or customer connections. Preventing competition on its own is not regarded as a legitimate interest;
- 2.14.5 MARINERG-i ERIC will want to consider provisions which prevent employment or engagement by a competitor, solicitation of other employees and solicitation/dealings with other third parties. The restrictions will not be relevant for the entire workforce and so an assessment of key individuals should be made, along with the types of provisions which will be most effective in order to protect its confidential information;
- 2.14.6 Payment for post-termination restrictions is not required and is uncommon in the UK but for other jurisdictions the requirements will vary where payment or part-payment of salary is required (e.g. Spain and Germany). Similarly in Ireland, there is no statutory requirement for an employer to continue to pay a former employee bound by a post-employment restrictive covenant;
- 2.14.7 MARINERG-i ERIC should be aware that if it terminates an employee's contract in breach of its terms, this will usually invalidate post-termination restrictions;
- 2.14.8 On a wider level, solid confidentiality provisions and clauses dealing with the ownership and transfer of IP created during employment should be included in

all employment contracts and service agreements. MARINERG-i ERIC will generally need to take active steps in order to protect its trade secrets and other sensitive confidential information.

2.15 Discrimination legislation

- 2.15.1** The majority of jurisdictions in which MARINERG-i ERIC will have operations will have laws prohibiting discrimination in the workplace;
- 2.15.2** In the UK, Ireland and many other jurisdictions, the prohibition on discrimination extends not only to the employment relationship and termination, but also to the recruitment process;
- 2.15.3** Most discrimination laws focus on "protected characteristics", which in the UK are: sex, race, disability, religion or belief, sexual orientation, age, marriage and civil partnership status, gender reassignment, and pregnancy and maternity. The applicable characteristics will differ from jurisdiction to jurisdiction;
- 2.15.4** The forms of discrimination in the UK and Ireland include: direct discrimination, indirect discrimination, harassment and victimisation. MARINERG-i ERIC will also need to be mindful of specific claims brought in relation to disability, which include where the discrimination is "arising from the disability" or where MARINERG-i ERIC fails to make "reasonable adjustments";
- 2.15.5** Employees of MARINERG-i ERIC will be entitled to bring claims such as this both during their employment and following termination (subject to the limitation periods for each country: three months for the UK);
- 2.15.6** In the UK, MARINERG-i ERIC may be in a position to defend claims of direct age discrimination, indirect discrimination and discrimination arising from disability, by showing that the treatment is a proportionate means of achieving a legitimate aim. Although, in practice it can be difficult to rely on this justification;
- 2.15.7** In the UK, if an employee succeeds in a discrimination claim, an employment tribunal will award compensation to put the employee in the financial position they would have been in had the unlawful act not occurred. There is no cap on the compensation that can be awarded. In the UK, in addition to the compensatory award, tribunals can make an injury to feelings award, which is capped;
- 2.15.8** Significantly, for MARINERG-i ERIC, it is possible that it will be liable for some discriminatory acts of its employees where these acts are committed "in the course of employment". In effect, MARINERG-i ERIC would be deemed to have committed the unlawful act of its employees. MARINERG-i ERIC may escape liability for acts of discrimination committed by its employees where it can demonstrate that it took "all reasonable steps" to prevent the employee from doing the discriminatory act in question, or from doing anything of that description. However, this defence has been interpreted narrowly and can be difficult to rely on;

- 2.15.9 In Ireland, vicarious liability can be imposed on an employer under the Employment Equality Acts 1998 to 2015 for the discriminatory acts of their employees committed in the course of their employment. As in the UK, it is a potential defence for an employer to show that he or she took reasonable steps to prevent the acts of discrimination.
- 2.15.10 It will be of paramount importance that MARINERG-i ERIC looks to implement equality and diversity training to its employers and look to maintain adequate diversity, anti-bullying/harassment and grievance policies. This will help MARINERG-i ERIC demonstrate that it takes "all reasonable steps" to prevent discriminatory acts in the workplace.

2.16 Employee data

- 2.16.1 With the impending implementation by member states of the European General Data Protection Regulation (2016/679) ("GDPR") to replace the existing EU data protection Directive 95/46 by May 2018, the European framework of data protection law is in a state of transformation;
- 2.16.2 In general data protection legislation in the UK, and further afield, governs the collection, processing and storage of employee data. Penalties for breach of these obligations include a current fine of up to £500,000 and compensation claims from employees. This will increase dramatically with the implementation of GDPR introducing fines for breaches of up to the higher of €10,000,000 or 2% annual turnover and for some other breaches the higher of €20,000,000 or 4% turnover;
- 2.16.3 There are also a number of circumstances where employers are required to notify the Information Commissioner before collecting and using employee data (e.g. where this is for the administration of a pension scheme). Breach of these obligations is a criminal offence;
- 2.16.4 MARINERG-i ERIC will need to be aware that the GDPR will affect how businesses manage the personal data of their employees and it will enhance employee rights to access their data. Specifically, MARINERG-i ERIC, along with other employers will see the following changes once the GDPR is fully implemented:
 - 2.16.4.1 there will be a need to *demonstrate* compliance under the new rules. This will mean that it will no longer be sufficient to just comply with data protection laws, MARINERG-i ERIC will need to establish systems which evidence their actual compliance;
 - 2.16.4.2 one particular change of note is that it will be more difficult for employers to rely on consent as a lawful basis for processing;
 - 2.16.4.3 MARINERG-i ERIC's employees will have an established right to be informed at the time data is obtained. In practice this should most likely consist of a form which is given to employees which explains: (i) the ID and contact details for MARINERG-i ERIC; (ii) the purpose and legal basis for processing; (iii) the period for which their data will be stored and the criteria for such storage; and (iv) an explanation that employees have a right to request rectification, erasure and to lodge a complaint;

2.16.4.4 a notification requirement that when MARINERG-i ERIC becomes aware that there has been a breach in relation to data, they will have 72 hours to notify the supervisory body of the breach. This self-reporting requirement will mean MARINERG-i ERIC will need clearly defined policies in place in order to meet the deadline for notifications;

2.16.5 MARINERG-i ERIC will also need policies in place which address any monitoring of employees' use of telephone, internet and email facilities provided they comply with certain data protections guidelines. As a general rule monitoring must be proportionate and employees should be notified that monitoring is being carried out, although there are strict rules governing the recording of telephone calls and the interception of emails;

2.16.6 The issue of the monitoring of employees closely overlaps with an employee's right to privacy, which extends to the workplace with some limitations. The consortium will need to be mindful across all relevant jurisdictions what is lawful conduct in this regard, and implement appropriate policies accordingly;

3. LEGAL CONSIDERATIONS FOR PROCUREMENT

3.1 General

3.1.1 MARINERG-i ERIC will need to procure a wide range of goods and services, from commodity office and business supplies to specialist goods and services associated with the specialist activities of the ERIC.

3.1.2 Public sector entities based in the EU are subject to the Public Procurement Directives which establish a legal framework for public sector purchasing. These Directives require public sector entities to procure goods, service and works with a value above specified financial threshold in accordance with specified procurement procedures and various other obligations, unless one of a small range of exceptions apply.

3.2 Legislative Framework

Application of the Procurement Directive

3.2.1 The ERIC Regulation² establishes the framework for setting up an ERIC. The Regulation provides that an ERIC is an international organisation within the meaning of the Procurement Directive³ Article 9(1)(b) of the Procurement Directive⁴ excludes from the application of the Procurement Directive contracts awarded pursuant to the particular procedures of an international organisation.

3.2.2 There has been debate amongst academic commentators on the application of the exception to international organisations, such as ERICs.⁵ In the first

² Regulation 723/2009 on the Community legal framework for a European Research Infrastructure Consortium (ERIC) EU Official Journal L 206/1 EN 8.8.2009

³ Article 7(3), Regulation 723/2009

⁴ Public Sector Procurement Directive EU/24/2014

⁵ See Baudouin Heuninckx, "Applicable Law to the Procurement of International Organisations in Europe", <http://www.nottingham.ac.uk/pprg/documentsarchive/phdconference2009/audouin%20heuninckx.pdf>

place, it has been questioned to what extent an international organisation amounts to a "contracting authority" for the purposes of the Directives. In general, the Directive applies to the procurement activities of State, Regional and Local public authorities in Member States. As international organisations are not part of the state structure, there may be an argument that they are not subject to the Directive.

3.2.3 However, in the case of ERICs this is not likely to be the case. As well as applying to State bodies, the Directive also applies to bodies "governed by public law". In the Directive the term "body governed by public law" means any body:

3.2.3.1 established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;

3.2.3.2 having legal personality; and

3.2.3.3 financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law.

3.2.4 It is highly likely that MARINERG-i ERIC (and most ERICs) will fall within the scope of this definition. It will obtain the bulk of its funding from member state public bodies and its management will be primarily made up of representatives of member state public bodies. Whilst MARINERG-i ERIC will have non-member state members, the Regulation explicitly provides that member state members must hold the majority of the voting rights in the Assembly of Members of each ERIC.⁶

3.2.5 It has been suggested that the exemption should not apply to international organisations which only have EU member states as members.⁷ This argument arises from the fundamental rationale for the immunity of international organisations from the application of national laws, which is to avoid the relevant states in which the organisations are located from being able to exert undue influence and thereby affecting the proper functioning and independence of the organisations.

3.2.6 However, where all of the members of an international organisation are member states it is argued that if the exemption were to apply it would be contrary to the obligation of the member states to take all appropriate measures to ensure fulfilment of the obligations arising out of the EC Treaty and to abstain from any measure that could jeopardise the attainment of the objectives of the EC Treaty. Nonetheless, there is no provision of the EC Treaty that prevents the EU from exempting all international organisations from complying with a specific directive.

3.2.7 This issue has never been directly considered by the European Court of Justice. The issue has been considered indirectly in cases related to the free

⁶ See Regulation 9(3)

⁷ See eg. "UK Government Response to the Commission Green Paper on Defence Procurement", 2005, p.6

movement of workers or competition law, without distinction between those organisations which only have EU member states as members and those including other states. In these cases, the CFI held that the purpose of the Directive was to coordinate national procurement laws, and that it was therefore not applicable to international bodies set-up by the Community institutions, which were not, like other international organisations, subject to the public procurement law of the EU member states.⁸

- 3.2.8 In this regard, it is also significant that the procurement activities of the EU institutions are regulated by specific rules that do not have to comply with the Directive, because the purpose of that Directive is the harmonisation of national law, with which the procurement rules of the EU institutions do not have to comply, even though those rules are in fact often based on the Public Sector Directive. If the EU institutions do not have to comply with the EC public procurement directives, it is questionable why other international organisations would have to.
- 3.2.9 As a result, we consider that the exemption from the application of the Procurement Directive will apply to MARINERG-i ERIC, even if MARINERG-i ERIC only has member states as members. If MARINERG-i ERIC has non-member states members (which is highly likely – given that the United Kingdom will have left the EU by the time that the ERIC is set up), this conclusion will be reinforced.

Application of the Treaty Principles

- 3.2.10 Even though the exemption from the application of the Procurement Directive will apply to MARINERG-i ERIC, it will nonetheless be subject to certain procurement obligations.
- 3.2.11 Article 10 of the Regulation provides that the Statutes of an ERIC must contain the basic principles covering the procurement policy of the ERIC, "*respecting the principles of transparency, non-discrimination and competition*". The draft Statutes must be submitted to the European Commission for approval when setting up the ERIC, and the European Commission must then verify that they meet the requirements of the Regulation.⁹ MARINERG-i ERIC must therefore incorporate within its Statutes some basic details of a procurement policy which are sufficient to demonstrate that MARINERG-i ERIC will observe the principles of transparency, non-discrimination and competition when undertaking procurements.
- 3.2.12 In any event, it is arguable that even in the absence of Article 10 of the Regulations, international organisations based in the EU must comply with these Treaty principles in their procurement activities, unless exempted by a privilege or a relevant rule of international law, or unless an exemption from compliance with the EC Treaty (such as the security exemption under Article 296 EC) is available.
- 3.2.13 This conclusion is almost certain for international organisations where a controlling majority of the member states are also EU member states. This is

⁸ See Case T-411/06, *Sogelma v European Agency for Reconstruction*, 2008

⁹ Article 5, Regulation 723/2009

because the member states must abstain from any measure which could jeopardise the attainment of the objectives of the EU Treaty. Allowing an international organisation under their control to act against provisions of the EU Treaty would be likely to be a breach of such negative obligation, unless justified by a relevant rule of international law. For the same reason, the EU member states that are members of the organisation would have the obligation to ensure that the rules and practices of the organisation, such as those related to procurement, comply with EU primary law.

- 3.2.14** Moreover, it seems that the ECJ does not consider the issue of control over the organisation's decision-making to be relevant to the applicability of EU law to an international organisation, so EU law would apply to the organisation whether or not a controlling majority of its member states have an obligation not to jeopardise the objectives of the EC Treaty.

Nature of MARINERG-i ERIC's Procurement Obligations

- 3.2.15** In the Commission's Practical Guidelines on setting up an ERIC¹⁰, the Commission expands on the Regulation and suggests that an ERIC must have a procurement framework of its own, which must comply with international standards and good practices.
- 3.2.16** One approach would be to cross-refer to the EU Procurement Directive within the statutes for MARINERG-i ERIC on the basis that the Directive is a manifestation of EU policy in this area and ought to reflect good practice. However, such an approach would not be advisable for MARINERG-i ERIC. This is because the Directive establishes a framework for the implementation of procurement legislation within each member state. The Directive does not establish a procurement policy for a particular organisation.
- 3.2.17** Instead, MARINERG-i ERIC should develop its own procurement policy to give effect to the EU Treaty principles outlined above and good procurement practice. In developing this policy, MARINERG-i ERIC can refer to a number of examples of international bodies that have developed procurement policies. Examples include the European Space Agency's Procurement Regulations¹¹, the approach to procurement taken in the European Central Bank Procurement Decision¹² and the European Bank for Reconstruction and Development Procurement Policy¹³.
- 3.2.18** The Procurement Regulations of the European Space Agency are very lengthy and somewhat complex, probably reflecting the fact that ESA has been in existence for a long time and that its procurement activities span a very wide range of goods, services and works. The procurement policies of the ECB and the EBRD are much more straightforward and could be a useful model for the procurement policies of MARINERG-i ERIC.

¹⁰ Legal framework for a European Research Infrastructure Consortium - Practical Guidelines

¹¹ See <http://emits.sso.esa.int/emits/owa/emits.main>

¹² See <https://www.ecb.europa.eu/ecb/legal/pdf/02007d9005-20120901-en.pdf>

¹³ See <http://www.ebrd.com/downloads/research/policies/ppr10.pdf>

The Enforcement Of MARINERG-I Eric's Procurement Obligations

- 3.2.19 The Regulation provides that the Commission can enforce an ERIC's ongoing compliance with the Regulation. Article 17 provides that the Commission can propose remedial action to the ERIC if it "obtains indications that an ERIC is acting in serious breach" of the Regulation. If no remedial action is taken, the Commission can ultimately repeal the decision establishing the ERIC. It would therefore be open to a supplier which felt that MARINERG-i ERIC was not observing its procurement obligations to complain to the Commission and ask it to propose remedial action.
- 3.2.20 We note also that Regulations can have horizontal direct effect allowing individuals to enforce obligations in a Regulation as against other individuals in the courts of EU Member States. As the MARINERG-i ERIC will have legal personality, it may therefore be possible for a supplier to apply to the court to enforce the MARINERG-i ERIC's compliance with its own Statutes.

3.3 Practical Implications of the Procurement Obligations

Provision regarding procurement in the MARINERG-i ERIC Statutes

- 3.3.1 The obligation in the Regulation is relatively limited. It only requires MARINERG-i ERIC to incorporate within its Statutes the "basic principles" covering the procurement policy. The Statute itself does little more than (i) refer to the fact that MARINERG-i ERIC will observe the principles of transparency, non-discrimination and competition when procuring contracts; (ii) provide that it will advertise all opportunities on its website (or at least all those over a certain, *de minimis*, threshold; and (iii) commit to adopting a more detailed procurement policy.
- 3.3.2 This approach will allow MARINERG-i ERIC greatest flexibility; if the procurement policy was itself enshrined in the Statutes, any amendment would require the approval of the Commission (which must approve amendments to the Statutes).¹⁴

Advertising contract opportunities

- 3.3.3 The obligation of transparency implies that MARINERG-i ERIC must make the market aware of contract opportunities. The European case law on the procurement directive requires only that there is a "degree of advertising sufficient to enable the market to be opened up to competition".¹⁵ This is likely to vary depending on the nature of the project, and would in our view require that:
- 3.3.3.1 very low value contracts, of no interest to people in other Member States, may not require any advertisement;
- 3.3.3.2 generally, all other contracts should be advertised on the internet, and certainly those that are above the EU thresholds that apply for public procurement procedures should be advertised. We would

¹⁴ Article 11 of the Regulation

¹⁵ Case C-324/98 *Telaustria*

suggest that MARINERG-i ERIC creates a portal on which to advertise contract opportunities;

3.3.3.3 to ensure competition for specialist contracts, it may also be *advisable also to advertise in dedicated trade press*;

3.3.3.4 for very high value contracts, MARINERG-i ERIC may want to consider advertising on a voluntary basis in the Official Journal of the European Union.

3.3.4 Any advert should set out the basic details of the contract to be awarded, and provide information on how to tender, or on how to express interest.

3.3.5 The detailed procurement policy should set out expressly what sort of advertisement will be used and when. It should also provide for any exceptions, such as when advertisement is not possible for reasons of urgency or where, for technical reasons, only one provider is able to provide the service.

Contract award procedure

3.3.6 MARINERG-i ERIC should be able to utilise any of a number of types of award procedures. Key things to consider are:

3.3.6.1 **Limiting the number of bidders:** whilst MARINERG-i ERIC must observe the principle of competition, it may nonetheless limit the number of bidders which it invites to tender provided this is done in a transparent and non-discriminatory manner.¹⁶ That would normally be by way of a pre-qualification questionnaire (PQQ) which tests the applicants' through means of objective factors such as experience, size, financial stability, qualifications etc. The factors should be proportionate (to ensure compliance with the principle of competition) and should not be discriminatory (e.g. should not require that the bidder is located in the same country or region as MARINERG-i ERIC unless that is objectively necessary).

Observing the principle of competition requires that a minimum number of bidders should be invited to tender. Applying the procurement directive by analogy, three may be an appropriate number to ensure competition in many instances, although it would be open to MARINERG-i ERIC to invite more to tender. That said, if two or fewer bidders apply, a process with fewer applicants will not necessarily breach the principle of competition.

3.3.6.2 **Type of procedure:** as with advertising, the type, and formality, of the procedure run is likely to vary depending on the nature and value of the contract. For low value contracts, it may be sufficient to simply seek a number of quotes (probably a minimum of three, to ensure that the principle of competition is observed). For high value, or more complex, contracts, a formal invitation to tender is

¹⁶ See by analogy paragraph 2.2.2 of the Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives

advisable to ensure that MARINERG-i ERIC demonstrably complies with its three obligations.

- 3.3.6.3 **Time limits:** MARINERG-i ERIC must respect the principles of non-discrimination and competition. It must therefore set time limits that are proportionate and reasonable; a time limit that is too short is likely both to disadvantage providers in other Member States and to limit competition. This would apply both to time limits in which to express interest in bidding for a contract, as well as time limits for responding to a PQQ or invitation to tender as appropriate.
- 3.3.6.4 **Procedural transparency:** the tender process should be described in sufficient detail in the tender documents so that everyone bidding can understand what is expected of them and how the tender process will be run. This should include, for example:
 - (a) the deadlines which will apply to all bidders;
 - (b) the language and currency for tenders;
 - (c) the process for asking and responding to clarification questions; and
 - (d) the processes for submitting and opening tenders.
- 3.3.6.5 **Information:** observing the principle of non-discrimination requires that bidders are treated equally throughout the procurement process. All bidders should be provided with the same information. Particular care should be taken during procedures which involve negotiation to ensure that information is shared equally.

Specifications/Requirements

- 3.3.7 **Non-discriminatory specification:** The principle of non-discrimination requires that the specification and requirements of a contract should be non-discriminatory. In particular, the case law and European Commission suggest that they should not refer to a specific make or source, or IP right, nor specify a specific origin unless doing so is absolutely necessary and objectively justified.
- 3.3.8 **Mutual recognition:** MARINERG-i ERIC must recognise certificates, diplomas and other formal qualifications from other Member States. Similarly, standards used should be European standards or alternatives from other Member States should be recognised.

Evaluation of Tenders

- 3.3.9 **Establishing award criteria and weightings:** The principles of transparency and non-discrimination require that the evaluation criteria that will be used to determine the successful bidder, and the weightings that will be applied to

them, are established before tenders are opened.¹⁷ In practice, it is common to establish award criteria and weightings when issuing the ITT.

- 3.3.10 **Disclosing award criteria and weightings:** The European case law is not clear as to whether the criteria must be disclosed in advance to bidders, but it is generally considered good practice to do so. The case law has clarified that weightings need not be disclosed in advance. However, it is also considered good practice to provide the weightings to bidders.¹⁸
- 3.3.11 **Applying award criteria:** the obligation of non-discrimination requires that the award criteria are applied equally to all bidders in the manner set out in the tender documents

After preferred bidder appointment

- 3.3.12 The principle of non-discrimination requires that any post-tender negotiations "should be organised in a way that gives all tenderers access to the same amount of information and excludes any unjustified advantages for a specific tenderer".¹⁹ In particular, MARINERG-i ERIC should avoid negotiations with a preferred bidder which make material amendments to the requirements or the preferred bidder's tender response. If it needs to do so, it should consider re-opening competition with other remaining bidders.

4. LEGAL CONSIDERATIONS FOR INTELLECTUAL PROPERTY

4.1 General

- 4.1.1 Intellectual Property (IP) will be produced as a consequence of MARINERG-i's activities and MARINERG-i will need to use the IPRs of its members and other third parties.
- 4.1.2 In general terms, IP is a collective term which is used to refer to a bundle of rights including patents, copyright, trademarks, database rights and confidentiality obligations.

4.2 Background IP

- 4.2.1 At a high level, 'Background IP' is any IP used in or relevant to a particular project, but which is already in existence and held by a consortium member prior to the commencement of that project. Background IP can be an essential part of the project and may represent an important component of a member's in-kind contribution to the MARINERG-i ERIC.

Points to consider:

- 4.2.1.1 How will existing relevant Background IP be contributed by the ERIC members? In particular, will the ERIC members assign/transfer those rights to MARINERG-i ERIC or, alternatively, licence them to MARINERG-i ERIC?

¹⁷ Case C-226/09 *Commission v Ireland*

¹⁸ Case C-226/09 *Commission v Ireland*

¹⁹ Paragraph 2.2.3 of Commission Interpretive Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives

4.2.1.2 If the ERIC members intend to license Background IP to MARINERG-I ERIC, certain terms will need to be considered, including:

- (i) exclusivity of licence:
 - (A) 'exclusive' licence: MARINERG-i ERIC can use the Background IP to the exclusion of all others, including the licensor consortium member;
 - (B) 'sole' licence: MARINERG-i ERIC and the licensor consortium member can both use the Background IP to the exclusion of all others; and
 - (C) 'non-exclusive' licence: MARINERG-i ERIC is able to use the Background IP, but the licensor consortium member retains the right to use and license the Background IP;

The type of licence a member will be willing to grant will likely depend on the importance of the Background IP to that member's core business, including whether it has already granted any third party any other licences in that Background IP.

- (ii) the relevant territory;
- (iii) whether royalty-free or for value;
- (iv) permitted scope and purpose of licence;
- (v) to whom is the licence granted:
 - (A) MARINERG-i ERIC only;
 - (B) other Consortium members; and/or
 - (C) any other (named) third parties.
- (vi) length of term; and
- (vii) any termination triggers.

4.3 Foreground IP

4.3.1 'Foreground IP' is any IP generated in the course of a project by the ERIC, or by its members alone or between themselves, or by a third party arising out of the project.

Points to consider:

4.3.1.1 How will new Foreground IP created by MARINERG-i ERIC or members or third parties be treated and who will be able to benefit from it?

- 4.3.1.2 Will MARINERG-i ERIC retain the Foreground IP that it creates?
- 4.3.1.3 Will the Foreground IP be distributed back to MARINERG-i ERIC members and, if so, will it:
 - (i) be assigned to a particular Consortium member?
 - (ii) be licensed only to the owners of relevant Background IP?
 - (iii) be licensed to all Consortium members?
- 4.3.1.4 Future IP created independently of the project by ERIC members may be required for the purposes of MARINERG-i ERIC's business. Consider whether this should be assigned or licensed to MARINERG-i ERIC. If licensed, consider on what terms as per Section 3.1.1.2 above.
- 4.3.1.5 Tax and other considerations that may need to be made. For example, Ireland is a leading location for the development, exploitation and management of IP and one of the key drivers for this is its attractive tax regime.

4.4 IP Strategy and Decision-making of MARINERG-i ERIC

- 4.4.1 Management of IP can require numerous decisions, which can have both a financial and time cost for the ERIC and its members. These may include decisions as to whether or not to seek registration of certain IP rights, the exploitation of those IP rights (e.g. whether to license certain IP rights), and when (and how) to pursue enforcement.
- 4.4.2 Determining and applying a uniform IP policy can streamline this and, accordingly, MARINERG-i ERIC should consider the establishment of an IP Steering Group. This group may be comprised of appointed individuals from some or all of the ERIC's members.

Points to consider:

- 4.4.2.1 What will be the IP Steering Group's mandate and scope?
- 4.4.2.2 Will there be pre-determined policy or criteria to determine whether IP should be registered²⁰, and if so in what jurisdictions, or remain unregistered²¹?
- 4.4.2.3 How will the creation of IP (whether registered or unregistered) be reported and recorded within MARINERG-i ERIC?
- 4.4.2.4 How will the costs of any registrations and/or professional advice be covered?

²⁰ Certain IP rights require timely registration in order to establish validity. These include patents, trademarks and designs.

²¹ Certain IP rights do not require registration to be effective. Examples of unregistered rights in the UK include copyright (including software), unregistered designs, unregistered marks and trade secrets. Some classes of IP, such as copyright and trade secrets are in any case not registrable in the UK.

4.5 Exploitation of Foreground IP by MARINERG-i ERIC

- 4.5.1 There will need to be consideration and determination of how the Foreground IP can be exploited.
- 4.5.2 MARINERG-i ERIC members should establish who will determine what IP can be assigned or licensed to third parties. This will likely, but not necessarily, be the IP Steering Group.
- 4.5.3 Consider how the ERIC will approve any commercialisation terms:
 - 4.5.3.1 Will there be standard terms?
 - 4.5.3.2 How will non-standard terms be negotiated and approved?
- 4.5.4 Will any member have a right to veto any assignments or licences (e.g. to a (named) competitor)?
- 4.5.5 What will the royalty provisions/licence fee for any licensed Foreground IP be? How will that royalty/licence fee be shared out?
 - 4.5.5.1 Will it remain in MARINERG-i ERIC?
 - 4.5.5.2 Will MARINERG-i ERIC members be entitled to any remuneration?

4.6 IP Enforcement

- 4.6.1 Who will be responsible for enforcing (i) Background IP and (ii) Foreground IP against any third party infringers?
- 4.6.2 If MARINERG-i ERIC decides not to take any enforcement action, will MARINERG-i ERIC members be entitled to initiate proceedings (and vice versa)?
- 4.6.3 Who will bear the costs (e.g. court fees, solicitors' fees) of any enforcement steps?
- 4.6.4 Consider to what extent MARINERG-i ERIC members should have to assist with any proceedings: this could include coordinating strategy, providing witness statements, etc.
- 4.6.5 In the event of a successful infringement claim, how will any award of damages for infringement be distributed amongst MARINERG-i ERIC and its members?

4.7 Completion or Winding Up of Project

- 4.7.1 Upon a winding up of MARINERG-i ERIC, how will the value of its IP be realised?
- 4.7.2 Will any IP previously assigned from the ERIC's members to the ERIC revert to its original owner?

4.7.3 Will any members have an option or right of first refusal to acquire the Foreground IP?

4.7.3.1 If so, how will the rights of MARINERG-i ERIC members be dealt with *inter se*? Will there be a particular order of priority in exercising an option to acquire, or should it go to the highest bidder?

4.8 Interparty Relationships between MARINERG-i members

4.8.1 MARINERG-i ERIC members may consider it desirable to be able to obtain a licence to use other members' IP. MARINERG-i ERIC members should consider in respect of any such licence:

4.8.1.1 whether members will have a right to licence and commercialise all Foreground IP;

4.8.1.2 whether the licence will be granted automatically or upon request;

4.8.1.3 what the terms of any licence may be;

4.8.1.4 if a member leaves MARINERG-i ERIC:

(i) how their Background and/or Foreground IP will be dealt with; and

(ii) where they have already been granted a licence, whether they will be permitted to continue to use any IP owned by other members and/or MARINERG-i ERIC. If so, will this be on the same terms or different terms to the original licence?

5. LEGAL CONSIDERATIONS ON GENERAL LIABILITIES

5.1 General

5.1.1 MARINERG-i needs to be mindful of the general liabilities that it may incur as a result of its activities. This section gives a general overview of certain of the key liabilities.

5.2 Operations Liability

5.2.1 MARINERG-i ERIC should consider the possibility of injury and property damage occurring due to any work being carried out on its behalf (e.g. by employees). Additional consideration should be given to health and safety measures to ensure a reasonably safe environment for employees to work in. The points listed below are based on the assumption that MARINERG-i ERIC will hire employees in the course of running its business.

5.2.2 Points to consider:

5.2.2.1 Personal Injury: Employers must provide employees with enough protection, assistance and training to try and prevent accidents at work from occurring. Liability in a personal injury claim, when for example, operating machinery at work, should be covered under employer's liability insurance. The terms of the insurance contract

will govern the claims procedure that an insured must follow, and MARINERG-i ERIC should therefore consider taking out such insurance.

5.2.2.2 Property Damage: If MARINERG-i ERIC was to own any property, including machinery and test equipment, it should take into account the risk of such property being damaged in the course of its operations. Employers can generally only recoup the cost of damages directly from the employee if there are clear contractual provisions to do so or if the employee has expressly agreed to cover the cost. In either case, the employee is expected to pay an accurate reflection of the cost of repair, never an arbitrary penalty amount. Disciplinary rules also often contain a provision which states that damage caused to company property through neglect by the employee is something that the employee can be disciplined for. It will be MARINERG-i ERIC's duty to inform their employees on any company policy for such deductions.

5.2.2.3 Health and Safety: MARINERG-i ERIC will need to abide by the local health and Safety regulations of the member state in which it operates. For example in the UK, the employer must make an assessment of risk to the health and safety of its workforce and act upon risks that it can identify and take actions to reduce them. Employers must also avoid the need for employees to undertake any manual handling activities which involve risk of injury. When employees operate equipment, the employer is required to ensure the safety and sustainability of that equipment and properly maintain it, irrespective of how old it is. In the UK, a breach of health and safety regulations can result in monetary penalties or imprisonment. The standard of liability for certain health and safety regulations is however not strict, so individuals claiming against their employer are required to prove negligence on the employer's behalf before being able to pursue a claim.

5.3 Premises Liability

5.3.1 If MARINERG-i ERIC owns any premises, it would be responsible for maintaining a relatively safe environment, as anyone entering any property owned by MARINERG-i ERIC will have a reasonable expectation of not getting injured.

5.3.2 Points to consider:

5.3.2.1 Slip and Fall Accidents: Each case will turn on whether MARINERG-i ERIC acted carefully so that slipping was not likely to happen, and whether the visitor was careless in not seeing or avoiding the condition that caused the fall. An adhered to health and safety policy should effectively reduce such accidents. In most cases, an injured person would need to prove that the cause of the accident was a dangerous condition and that MARINERG-i ERIC, acting as owner or possessor of the property knew of it and it was foreseeable that its negligence would create the danger at issue.

5.3.2.2 Occupier's Liability: If MARINERG-i ERIC were to control land, premises, buildings, warehouses, vessels, vehicles, offices etc., it can be held liable when death, injury or property damage happens to a lawful visitor on that land. MARINERG-i ERIC will have to take reasonable care that any visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted to do. With respect to trespassers, if MARINERG-i ERIC knows that it is likely that trespassers will enter and is aware of a danger, it will be under a duty to give reasonable warning to prevent injury.

5.4 Liability around customer data

5.4.1 MARINERG-i ERIC is likely to hold some sort of customer data that could be misused if stolen or mishandled. MARINERG-i ERIC will be responsible for preventing any data breaches and protecting its customer data from identity theft.

5.4.2 Points to consider:

5.4.2.1 identify what personal information it will hold. MARINERG-i ERIC should analyse all the potentially sensitive data it may control, process or have access to;

5.4.2.2 ensure it does not collect or keep sensitive information it does not need. Under the new European GDPR regime (effective from 25 May 2018), personal information must not be kept longer than is necessary for the purpose for which the data is processed;

5.4.2.3 dispose of customer data no longer needed and in the correct manner;

5.4.2.4 build effective security measures to protect sensitive data. This should include physical security, electronic security, employee training and investigating the data privacy and security policies in place with contractors and service providers; and

5.4.2.5 ensure there is an effective Data Security Response Plan in place and that any employees are familiar with it.

5.4.3 Breaches of any Data Protection Legislation are likely to have severe impacts on MARINERG-i ERIC. The new GDPR poses fines of up to the higher of €10,000,000 or 2% annual turnover and for some other breaches the higher of €20,000,000 or 4% turnover.

5.5 Management Liability

5.5.1 With respect to the financial liability of the members of MARINERG-i ERIC, the default position is that this is limited to their respective contributions provided to the ERIC, although members can provide for a different liability regime going above their contributions in the Statutes as long as they cover as a minimum the points listed in Article 10 of the ERIC Regulations.

5.5.2 The main advantage to a limited liability structure is that in the event that MARINERG-i ERIC was to find itself in financial difficulty, its members will at most only lose what they contributed into the ERIC. As a separate legal entity,

MARINERG-i ERIC will have its own independent existence from its members and its own rights and responsibilities at law, enabling it to enter into contracts in its own right.

5.6 Environmental risks

5.6.1 MARINERG-i ERIC should consider what impact (if any) its research projects or testing equipment will have on the environment. In certain circumstances, it may be necessary to take out environmental liability insurance.

5.6.2 Points to consider:

5.6.2.1 Noise Pollution: Today there is greater awareness of the fact that machine generated noise pollution in the environment disrupts the activity or balance not only of humans but also of animal life. A set of EU rules is concerned with noise pollution and focuses on reducing noise from specific sources, but mainly from road and air traffic. The International Maritime Organisation's (IMO) regulations focus on the effect of mechanical vibrations on board seagoing vessels with regard to the wellbeing of ship personnel and crew²². The IMO sets some technical standards for vessels in this regard.

5.6.2.2 Environmental Damage: Under the Environmental Liability Directive (ELD), businesses must investigate the cause of any contamination and pay for remedial action. However liability under the ELD has little in common with standard civil liability rules. For example, the ELD does not give private parties a right of compensation as a consequence of environmental damage or on imminent threat of such damage occurring. Under the ELD, operators of certain activities deemed to be of actual or potential concern to the environment can be held liable in the event of environmental damage. An operator can be any natural or legal, private or public person who operates or controls the damaging occupational activity or where provided for in national legislation, has decisive economic power over the technical functioning of the activity, including the holder of a permit or authorisations for such an activity. The operator liable under the ELD must bear the cost of any necessary preventive or remedial actions.

5.6.2.3 Marine Licences:

(a) Marine licensing is required to regulate sustainable development in the marine environment in a way that minimises adverse impacts on the environment, human health and legitimate uses of the sea (s.66 MACAA 2009). A person may only carry on a licensable marine activity in accordance with a marine licence granted by the appropriate licensing authority. However, certain licensable marine activities are exempt or do not require a licence.

²² Exposure to noise and vibrations is regulated and limits for maritime vessels are given in the ISO standard 6954: Guidelines for permissible mechanical vibrations on board seagoing vessels to protect personnel and crew. The IMO publication Noise Levels on Board Ships contains the Code on Noise Levels on Board Ships (resolution A.468(XII)), developed to stimulate and promote noise control at a national level within the framework of internationally agreed guidelines, and the Recommendation on methods of measuring noise levels at listening posts (resolution A.343(IX)).

- (b) Subject to the exemptions listed in the act, the marine activities that require a licence include but are not limited to activities such as constructing a port, constructing an offshore windfarm or dredging a channel. Some exemptions include oil and gas exploitation, carbon capture and storage and dredging by harbour authorities. The licensing authorities can also exempt certain activities by order. For most of the categories of licensable activities, a marine licence is required for that activity to be carried on in the sea, or on or under the seabed, either in the UK marine licensing area or outside the UK marine licensing area, from a British vessel, aircraft or marine structure. There are special rules for dealing with licence applications for connection with offshore generating projects (s.78-84 MACAA 2009).
- (c) If the scope of work carried out by MARINERG-i ERIC does not fall under any exempted activities or if no order has been made by the relevant marine authority to carry out a certain activity, it may need a marine licence to carry out operations in the sea.

5.7 Liability for contracts and leases

5.7.1 The liabilities the ERIC will bear in relation to third parties will largely depend on the terms of the contracts entered into with each relevant third party. When MARINERG-i ERIC signs a contract, it has a financial obligation to pay for goods or services rendered and to uphold its obligations under the contract, failing which it may be liable for damages for breach of contract if the third party suffered a loss as a result of MARINERG-i ERIC's breach of its obligations.

5.7.2 Points to consider:

5.7.2.1 Termination of a contract: Most formal written contracts will have an initial period with an option to extend if appropriate. MARINERG-i ERIC must be aware of any notice periods to extend a contract or any automatic renewal provisions. Some contracts can be terminated in advance of their expiry by giving notice of such early termination to the other party, and may require payment of partial amounts owed or adjusted amounts, whereas others cannot be terminated early.

5.7.2.2 Leases: When entering into any lease, MARINERG-i ERIC should be aware of general liabilities around rent (including occupational and service charges), rent review, repair and alterations, the term and any break clauses, subletting, alienation, assignment and permitted use. A properly negotiated lease will treat all of the areas above in a consistent manner, allocating risk in accordance with available insurance. In the UK, parties are only liable for foreseeable damages, however more robust limitations can be drafted to limit foreseeable losses arising out of certain kinds of claims or introducing a cap on the total losses the parties can be liable for.

5.7.2.3 Third Parties: With a few exceptions, any contract that MARINERG-i ERIC enters into that may confer a benefit to a non-party may be

enforceable against MARINERG-i ERIC in the UK under The Contracts (Rights of Third Parties) Act 1999. This Act is widely used to give third parties the benefit of IP rights, duties of confidentiality, indemnities, payments and protection from types of liability. However the act is commonly excluded in most commercial contracts that are subject to English Law. There is no comprehensive equivalent to the UK's Contracts (Rights of Third Parties) Act 1999 in Irish Law although there are 'piecemeal legislative reforms' in place in Ireland which in limited instances confer third-party rights.

5.8 Sovereign Immunity

5.8.1 The rules of liability and obligations applicable to privately owned ships do not apply to governmental ships employed in non-commercial service. To the extent that MARINERG-i ERIC either: (i) owns a vessel; or (ii) conducts testing on a vessel that is owned by a government department or NGO, which is operated for non-commercial purposes, it is worth being aware that it will enjoy a number of advantages, such as:

5.8.1.1 Immunity from the civil and criminal jurisdiction of the coastal State

- (a) The immunity protects from arrest, seizure or attachment while operation in the waters under jurisdiction of a coastal State or calling at its port. This could protect vessels from industrial espionage during detention or from searches on board that could interrupt research activities. With regard to criminal matters, if crew members or scientists suffer any injury or are subject to any offence or criminal act, the coastal State will not have jurisdiction.
- (b) It is important to note however that immunity from the civil and criminal jurisdiction is not absolute. With regard to civil matters, the vessel will be immune, for example, in case of assistance, salvage or collision disputes. However, according to French and German law the coastal jurisdiction will retain, for instance, its competence for disputes between its nationals and the vessel with respect to services and works carried out on the vessel.
- (c) As for criminal offences, it depends on whether the criminal act is committed by or against the national of the coastal State or whether a crew member committed the criminal act on the mainland and not on board the ship. However, even in this case, the coastal State may waive its jurisdiction for reasons of political expediency or else seek an amiable settlement on a State-to-State basis.

5.8.1.2 Payments for obligations and settlement of disputes on a State-to-State basis

- (a) Immunity offers a more flexible and suitable way of settling disagreements and also exempts any vessel used from obligations with regard to the protection and preservation of the marine

Deliverable 5.3



environment which do not apply to vessels owned or operated by a State and used on governmental non-commercial service.

Bird & Bird
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