



European IPR Helpdesk

Fact Sheet

IP Management in European Structural and Investment Funds

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Introduction

European Structural and Investment Funds (ESI Funds) play a key role in reducing regional disparities in terms of income, wealth and opportunities by stimulating economic and social development in the European Union¹.

Intellectual Property (IP) management is a very important part of any successful initiative aimed at generating new knowledge and innovation. Research and innovation projects funded under the ESI Funds are not an exception and beneficiaries should take the time to understand and address the IP issues that may arise in the different phases of such projects. This fact sheet provides guidance in handling IP-related matters in research and innovation projects funded under the ESI Funds.

The ESI Funds are implemented through the programmes drawn up by the Member States which set out the national plans on how to use those funds². Therefore, specific and different IP rules can be introduced by the national authorities for each programme and project.

For this reason, in order to draw a rough framework for IP management applicable to all ESI Funds, this fact sheet follows the general IP obligations set out for the Horizon 2020 funded projects, as these constitute “a good practice” for EU-funded projects, as well as the best practices applied in businesses. However, the participants in ESI funded projects are strongly advised to always check their national rules and specific requirements on IP to get the accurate information on this topic.

Although the present document has been conceived to address the specific IP issues in projects funded under the thematic objective (TO) “Research and Innovation”, similar considerations could be valid for other projects entailing the creation and use of intellectual property, albeit funded under a different TO³.

1. ESI Funds – What they are

The “European Structural and Investment Funds” or “ESI Funds” is a common designation for five European funds: the European Regional Development Fund (ERDF), the European Social Fund (ESF), the Cohesion Fund (CF), the European

¹ For detailed information about ESI Funds, please refer to [the Blue Book and the Common Provisions set forth in the Regulation No.1303/2013 concerning ESI Funds, Rule 27.](#)

² See Regulation (EU) No. [1303/2013 Rule 27.](#)

³ Performing research and innovation activities is also possible under other TOs such as TO 2 (ICT: products and services, ecommerce, e-government, etc.), TO 5 (climate adaptation: innovative technologies for adaptation and risk prevention), TO 7 (promoting sustainable transport and removing bottlenecks: innovative solutions for environmentally friendly and low-carbon transport systems), TO 8 (entrepreneurship skills should include innovation management) and TO 11 (administrative capacities can be enhanced through innovation).

Agricultural Fund for Rural development (EAFRD) and the European Maritime and Fisheries Fund (EMFF), which operate under a common framework⁴ as well as fund-specific regulations⁵.

With a budget of 454 billion EUR for 2014-2020, these funds are the European Union's main investment policy tool.

ESI Funds are allocated to the Member States following bilateral negotiations with the European Commission at the beginning of each seven-year programming period (the current one being 2014-2020). Despite being EU money, ESI Funds are under the responsibility of Member States and their national or regional authorities, which manage these budgets under their respective Partnership Agreements⁶ and Operational Programmes (OPs)⁷.

It is therefore the ultimate decision of managing authorities in Member States where and how funds are invested at project level within the framework of the relevant OP.

Eleven thematic objectives (TOs) are outlined under ESI Funds⁸:

- TO 1 – Research, technological development and innovation
- TO 2 – Information and communications technology (ICT)
- TO 3 - SME competitiveness for agricultural, fisheries and aquaculture sectors
- TO 4 - Low carbon economy
- TO 5 - Climate change adaptation and risk management
- TO 6 - Environment and resource efficiency
- TO 7 - Sustainable transport and network bottlenecks
- TO 8 - Employment and labour mobility
- TO 9 - Social inclusion and combating poverty and discrimination
- TO 10 – Education, training, vocational and lifelong learning
- TO 11 - Institutional capacity of public authorities and efficiency in public administration

⁴ See Regulation (EU) No. [1303/2013](#).

⁵ See Regulations (EU) No. [1301/2013](#), [1304/2013](#), [1300/2013](#), [1305/2013](#).

⁶ Partnership agreements between the European Commission and individual EU countries set out the national authorities' plans on how to use funding from ESI Funds

⁷ Once the partnership agreements have been adopted, the European Commission and the national authorities agree on programmes setting out the priorities for each country, region or policy area concerned.

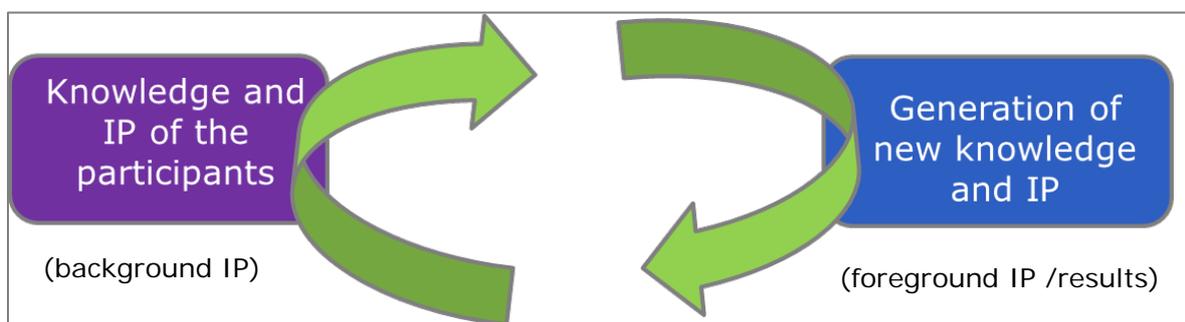
⁸ For further information on ESI Funds, please consult the [Guidance for Beneficiaries of European Structural and Investment Funds and related EU instruments](#).

2. The importance of managing IP in projects funded under TO1

Projects funded under the first TO - research and innovation (R&I) - entail the creation and use of IP.

In any R&I collaborative project, which has generally a multi-partner character, project partners bring and share expertise, knowledge, data, tangible and intangible assets already developed before the start of the project (and generally called "background" IP) to create new knowledge and results (also indicated as "foreground" IP) throughout the project lifecycle.

Therefore, IP represents an indispensable element and its management plays an essential role in the whole project management process.



Sharing knowledge, technology and expertise between project partners is an enormous benefit that could nevertheless entail the risk of leakage of such assets and free-riding if not managed effectively.

On the other hand, also due to the co-development activities that might be carried out in collaborative projects, the efficient allocation of results generated in the course of the project is crucial for their optimal exploitation.

Therefore, beneficiaries of ESI Funds under TO1 should manage IP from the very early stage of the collaborative innovation process.

3. Handling IP during the elaboration of the proposal

3.1 Addressing confidentiality issues

When engaging in an innovation partnership, it is important to realise that potential project participants are about to disclose information with the purpose of defining the research idea. This information may relate to a technology and knowledge that might not have been protected yet. In this case, any disclosure during the preparation of the proposal could prevent the future protection of such technology or knowledge as a patent or as other IP rights.

It is therefore best practice to enter into a non-disclosure agreement (NDA - also known as confidentiality agreement)⁹ before starting to collaborate with potential project partners. This agreement establishes the conditions under which partners disclose information in confidence¹⁰.

Instead of taking the form of a stand-alone agreement, confidentiality obligations may also be included in a Memorandum of Understanding (MoU), should the partners prefer to define further aspects of their collaboration at the very beginning of the negotiations.

When drafting confidentiality clauses, great care needs to be taken in how the term "confidential information" is defined¹¹. The parties need to have a clear understanding of which information is covered by the confidentiality obligation, and each recipient needs to ensure that receiving confidential information from the other party will not lead to a situation in which the recipient may no longer be able to clearly distinguish the confidential information received from its own information.

Confidential information should therefore be clearly defined and, if appropriate, marked as confidential. Otherwise, it is generally deemed that all exchanged information is treated as confidential, unless it can be shown that it was already known by the receiving party or that it was in the public domain.

3.2 Assessing the state-of-the-art

Under the ESI funding scheme, potential R&I projects are evaluated according to their likely contribution to the economic development of the Member State or region concerned as well as on their scientific or technological merits.

Therefore, it is advisable to describe in the proposal to what extent the proposed work is ambitious, whether it has an innovation potential and if it is beyond the state-of-the-art (prior art)¹². For this reason, a state-of-the-art search should be carried out, including not only an examination of scientific literature, but also the results of patent searches.

Patent searches can be performed free of charge by using the European Patent Office's (EPO) [Espacenet database](#) and/or the World Intellectual Property Organization's [PATENTSCOPE database](#)¹³. Inexperienced users may seek

⁹ For further information on non-disclosure agreements, please refer to the European IPR Helpdesk fact sheet "Non-disclosure agreement: a business tool" available in our [online library](#).

¹⁰ Models of NDA and MoUs are available in the "useful documents" section of our [online library](#).

¹¹ For further information on this topic, please refer to the European IPR Helpdesk fact sheet "How to manage confidential business information", available in our [online library](#).

¹² For further information on prior-art-searches, you can consult [the European Patent Office](#).

¹³ For details on how to search for patent information, we suggest that you consult our fact sheet "How to search for patent information", available in our [online library](#).

assistance from national patent offices, [PATLIB centres](#) or private patent attorneys, as patent searching generally requires a certain degree of expertise in interpreting the search results.

3.3 Considering third parties' rights

Applicants should also consider the intellectual property rights owned by others. In particular, it is important to analyse whether the exploitation of the project's potential results would infringe third parties' rights, namely patents. Indeed, patents are rights that provide their owner with the right to exclude others from commercially exploiting the patented invention. Thus, commercialisation of a product incorporating a prior patent of a third party may result in an IP infringement. Not considering third parties' rights may therefore hamper the future plans for the exploitation of results and/or increase the costs of the project, since it would be necessary to conclude licensing agreements with third parties for using their patented technology or move away from the initial research plans.

Therefore, applicants should consider performing freedom to operate (FTO) analysis to identify whether their project result would infringe any third party IP rights¹⁴.

3.4 Project name and acronyms

Refraining from using an acronym identical or similar to a registered trade mark for goods and/or services in the same area of business is important, specifically when the project partners intend to commercially exploit a result or provide a service in the market under the acronym of the project. Indeed, such use in the market could lead to trade mark infringement actions, and the consortium could be the target of infringement allegations.

It is therefore best practice to perform preliminary trade mark searches in order to avoid such allegations. These searches can be performed using online free search tools: [TMview](#), provided by the European Union Intellectual Property Office (EUIPO) and/or WIPO's [ROMARIN database](#). Comprehensive searches can also be performed by certain national Intellectual Property Offices or by IP professionals.

¹⁴ For more information regarding FTO analysis, please refer to the European IPR Helpdesk fact sheets, "IP due diligence: assessing value and risks of intangibles" and "IP Audit: Uncovering the potential of your business" available in our [online library](#).

4. Contractual issues within the project beneficiaries



In section 3 of this fact sheet, we have mentioned general IP measures, which can be applicable to almost all projects to secure participants' rights. From this section on, we will focus on the contractual issues between the project beneficiaries, which are generally set forth by the specific rules of each project call.

As there are no specific rules for ESI Funds concerning IP, the conditions and suggestions introduced in this section and in the following section 5 are based on Horizon 2020 project rules (collaborative projects) and business best practices. Therefore, the participants are strongly advised to check national authorities' rules and conditions to check if any specific IP rules should be applied.

When a partnership between different entities is created for conducting R&I projects, the parties usually sign a so-called consortium agreement.

Such agreement is a private contract, which aims to regulate the relationship between the project beneficiaries, defining their respective obligations, the organisation of the work, the management of the project and the generated IP (foreground IP/results).

IP-related issues that are to be addressed within consortium agreements include at least:

- Access rights to background and foreground IP for project execution and exploitation purposes;
- Identification of the background IP;
- Allocation of the ownership of IP generated in the framework of the project;
- Confidentiality issues;
- Mechanisms to settle the possible disputes arising in the consortium concerning IP matters.

4.1 Access Rights

In R&I projects, sharing knowledge, technology and expertise between project partners is often the condition to achieve valuable innovation and its successful exploitation. It is therefore important that each project partner can access and use other partners' knowledge and/or technology (including IP rights) developed during the project or owned before its start - such as background IP, necessary for the implementation of the project and/or for the exploitation of the results created.

Therefore, the consortium agreement should set out:

- the conditions under which the access rights are given (royalty-free or under fair and reasonable conditions);
- the procedure regarding the request for access rights and the acceptance of conditions regarding confidentiality and use for the intended purposes (e.g. in writing);
- the duration of such access rights.

The consortium agreement could also include further specificities, such as:

- a procedure regarding the possible waiving of access rights by written confirmation;
- whether access rights confer the entitlement to grant sub-licences and if yes, the conditions of sub-licensing.

4.2 Identification of the background IP

The implementation of a R&I project may require the use of pre-existing knowledge, data and IP (background IP) held by the participants prior to their accession to the project. Participants are, of course, responsible for ensuring the ownership of their background together with their right to grant access to it (i.e. access rights to background IP).

In order to ensure that the proper implementation of the project would not be hampered by any exclusion, project partners are advised to identify and agree on the background information to be brought to the project, in writing such as in positive and/or negative lists¹⁵. Such identification of the background is indeed crucial to ensure that all the data, know-how, information and IP rights needed for the implementation of the project will be included in the background accessible to the other beneficiaries.

Depending on specific circumstances, beneficiaries may agree to exclude specific background. Such an exclusion may be temporary (e.g. to permit the adequate protection of the background prior to providing access) or limited (e.g. to exclude only one or more specific beneficiaries).

In addition, it is highly recommended to include provisions on the ownership of the improvements of the background, and possible royalties to be applied.

¹⁵ In Horizon 2020 projects, partners are obliged to identify and agree on the background in writing. Please refer to your specific ESI Funding call and the requirements of your national authority to check if there is such an obligation. Even if there is no obligation for such, it is strongly advised to establish an agreement concerning the identification of the background in writing.

4.3 Ownership of foreground IP

The allocation of ownership of IP and research results generated in R&I projects should be clarified as early as possible. Projects beneficiaries could address the issue before the start of the project, in the consortium agreement.

Ownership of foreground IP (results) usually rests with the party generating that IP¹⁶.



To avoid or resolve potential ownership disputes, beneficiaries should keep documents such as laboratory notes to show how and when they produced the results.

However, during the project, IP may be created jointly with other partners in a way that the share of the respective contribution cannot be ascertained. In this case, a regime of joint ownership comes into place¹⁷.



In order to ensure that ownership, protection and defence of jointly generated IP are correctly allocated, joint owners are strongly advised to sign a joint ownership agreement regulating the allocation and terms of exercise of that joint ownership.

The following non-exhaustive checklist identifies the essential IP issues to be addressed in a joint ownership agreement:

- Assignment of shares;
- Conditions of exploitation;
- IP protection and maintenance¹⁸.

Depending on the circumstances, joint owners may decide to opt for an alternative regime¹⁹. In this regard, an alternative solution is to transfer the ownership of the jointly created results to one of the parties and for that party to grant each participant broad access rights and compensation rights in the event of exploitation of the IP.

¹⁶ This is indeed one of the fundamental rules under Horizon 2020 projects. However, depending on the ESI Funding call and the rules set out by your national authority, different ownership regimes may apply.

¹⁷ A joint ownership regime is a scheme under Horizon 2020 projects. Check your ESI Funding call and the rules of your national authority for the applicability of this and other regimes. You can find information on "IP joint ownership" in our dedicated fact sheet available in our [online library](#).

¹⁸ In order to maintain the protection conferred by registered intellectual property rights, it might be necessary to pay periodical fees (e.g. in the case of patents) or to request a renewal of the registration by the due date (e.g. in the case of trade marks and industrial design).

¹⁹ Check your specific ESI Funding call and the rules set out by your national authority - especially about the transferability of ownership and its conditions.

4.4 Confidentiality

Clauses determining the confidentiality obligations and their limits should be introduced within the consortium agreement. Such clauses regulate what information is deemed to be confidential and what is not, confidential labelling of documents, the procedures agreed upon for the transfer of confidentiality, to whom the confidential information may be disclosed and under which conditions, and the period of time during which the confidentiality obligations will be in force, including those surviving the duration of the consortium agreement.

4.5 Dispute Settlement

If any disputes arise between beneficiaries, they should be resolved as quickly and as amicably as possible. For this purpose, the consortium agreement may include a time limit for negotiations between the disputing parties before bringing the case to court.

Consortium partners should also consider including clauses in the consortium agreement providing mechanisms which are alternative to court proceedings, namely the alternative dispute resolution (ADR) procedures²⁰. Such mechanisms have the advantage of avoiding the heavy costs of litigation as well as settling the dispute faster and confidentially.

In this respect, WIPO's Arbitration and Mediation Center offers, on a not-for-profit basis, ADR procedures including mediation²¹ and (expedited) arbitration²².

5. Protection, dissemination and exploitation of results

5.1 Protecting project results

R&I projects often achieve results encompassing intangible assets that are potentially protectable with IP rights or trade secrets (i.e. with confidentiality).

Protection of project results is crucial in order to reap the full benefits from the R&I activity performed and to avoid those results being unduly exploited by others.

²⁰ For further information on mediation and arbitration, consult the European IPR Helpdesk fact sheet "Efficient resolution of disputes in R&D collaborations, licensing and other technology transfer" in our [online library](#).

²¹ Mediation is a non-binding procedure where a neutral intermediary (the mediator) helps the parties settle their dispute. More information at <http://www.wipo.int/amc/en/mediation/index.html>

²² Arbitration is a procedure where parties submit a dispute to a tribunal of one or three arbitrators, who issue an internationally enforceable binding decision (the award). Expedited arbitration is an arbitration carried out in a shortened time and at reduced cost. For more information, check the WIPO website at <http://www.wipo.int/amc/en/arbitration/>

The available forms of IP protection that, depending on the circumstances, can be available are illustrated in the table below.

Subject Matter	Patent	Utility Model	Industrial Design	Copyright	Trade Mark	Confidential Information
Invention (e.g. products, processes)	X	X				X
Software	(X)*			X		X
Scientific article				X		
Design of a product			X	X	X	
Name of a technology/product					X	
Know-How						X
Website			X	X		

* Although some patent systems (e.g. United States and Japan) recognise patent protection for software, in Europe software patentability is still a debated issue given its exclusion from the patentable subject matter as per Article 52(2)(c) and (3) of the European Patent Convention (EPC).

When deciding on protection, beneficiaries should also consider the other beneficiaries' legitimate interests.

Although a beneficiary is generally not required to consult the other beneficiaries before deciding whether to protect a specific result which it owns, beneficiaries can foresee arrangements (either in the consortium agreement or in separate agreements), to ensure that decisions on protection will be taken according to the interests of all beneficiaries concerned²³.

For example, beneficiaries could agree on the right of each beneficiary to object to the protection of a specific result when it would significantly harm their legitimate interest (e.g. when protection would lead to the disclosure of valuable background that is held by another beneficiary as trade secret).

Furthermore, in defining the territorial coverage of the protection, beneficiaries should take into account the planned commercial exploitation of the results.

5.2 Dissemination

Dissemination is the process of disclosing project results and making them available to the public. Scientific publications, general information on web sites, participation at conferences or trade fairs are some examples of dissemination activities.

²³ Always check your specific ESI Funding call and the rules set out by your national authority for protection of foreground IP (results) and ownership.

Dissemination represents an essential means to maximise the impact of the research and contributes to promote the profile of the involved organisations strengthening their research capacity.

However, early dissemination of results that are potentially protectable with IP rights or as a trade secret can prevent their future protection. Indeed, such a risk can occur if a result is disclosed in writing (including by e-mail) or orally (e.g. at a conference) prior to filing for protection — even to a single person who is not bound by secrecy or confidentiality obligations (typically someone from an organisation outside the consortium).



In order to avoid prejudicial disclosures, it is strongly recommended to not disseminate any information concerning the results before a decision on their protection is made; the required steps for protection measures are then taken.

For this purpose, beneficiaries can foresee arrangements (either in the consortium agreement or in separate agreements) to ensure that decisions on dissemination take due account of the interests of all beneficiaries concerning in particular the protection of results and confidentiality²⁴.

For example, beneficiaries could agree on the right of each beneficiary to be informed about any planned dissemination of project results and to object to such dissemination when it would represent a significant harm (e.g. disseminating the results would lead to disclosure of valuable background held by another beneficiary as a trade secret or would make protecting another beneficiary's results more difficult).

5.3 Exploitation of project results

Exploiting results for commercial and/or further research purposes is in the interest of beneficiaries. The exploitation of results is also consistent to the main aim of ESI Funds, i.e. enhancing the economic and technological development of the Member State or region concerned²⁵.

Beneficiaries may choose to take up exploitation activities on their own, using the results achieved to perform further research activities or incorporating the technology developed into products and services to be offered in the market.

²⁴ Check your specific ESI Funding call and the rules set out by your national authority for the specific dissemination rules.

²⁵ Check your specific ESI Funding call and the rules set out by your national authority for the specific rules concerning exploitation of results.

They may also decide to indirectly exploit project results by assigning or licensing them to third parties^{26,27}.

a) Transfer

Although each project partner has the right to transfer its own results, such a transfer should not prevent the smooth exercise of the right of access to those results by the other project partners.

Indeed, when such a right of access is provided in the consortium agreement, the beneficiary willing to transfer its own results must however ensure that its obligation to give access also applies to the new owner.

In this respect, the consortium agreement should include specific provisions to ensure that, where a transfer of ownership is envisaged, the legitimate interests of the other project participants are not harmed.

For example, beneficiaries could agree on the right of each beneficiary to be informed of any planned transfer and provided with sufficient information concerning the future owner. Each beneficiary should also have the right to object to a transfer that may harm its legitimate interests (e.g. alleging that the future owner has a proven track record of systematically legally challenging a beneficiary's access right claims).

b) Licence

Also, when it comes to license project results, it is necessary to ensure that access rights can be exercised by the other beneficiaries (when such a right of access is provided in the consortium agreement).

As a consequence, while beneficiaries should be free to license their own results under a non-exclusive licence, the consortium agreement should include provisions allowing exclusive licences only if all other beneficiaries have waived their access rights.

²⁶ Ensure that your specific ESI Funding call and/or the rules set out by your national authority allow indirect exploitation (licensing or assignment) and check the conditions.

²⁷ For additional information on the indirect exploitation of R&D results, it is possible to consult the fact sheets "Commercialising Intellectual Property: Knowledge Transfer Tools", "Commercialising Intellectual Property: Assignment Agreements", "Commercialising Intellectual Property: Licence Agreements" as well as the "IP Guide to Commercialisation" available in our [online library](#).

Useful Resources

For further information, see also:

- *Guidance for Beneficiaries of European Structural and Investment Funds and related EU instruments*
http://ec.europa.eu/contracts_grants/pdf/synergies_beneficiaries_en.pdf
- *The blue book on European Structural and Investment Funds (official texts and commentaries)*
http://ec.europa.eu/regional_policy/sources/docgener/guides/blue_book/blue_guide_en.pdf
- *Fact sheet "Non-disclosure agreement: a business tool"*
<http://www.iprhelphdesk.eu/Fact-Sheet-Non-Disclosure-Agreement>
- *Fact sheet "How to manage confidential business information"*
<http://www.iprhelphdesk.eu/Fact-Sheet-How-to-Manage-Confidential-Business-Information>
- *Fact sheet "How to search for patent information"*
<http://www.iprhelphdesk.eu/Fact-Sheet-How-to-Search-for-Patent-Information>
- *Fact sheet "IP due diligence: assessing value and risks of intangibles"*
<http://www.iprhelphdesk.eu/Fact-Sheet-IP-Due-Diligence>
- *Fact sheet "IP Audit: Uncovering the potential of your business"*
<http://www.iprhelphdesk.eu/news/ip-audit-uncovering-potential-your-business>
- *Fact sheet "IP joint ownership"*
<http://www.iprhelphdesk.eu/Fact-Sheet-IP-Joint-Ownership>
- *Fact sheet "Commercialising Intellectual Property: Knowledge Transfer Tools"*
<http://www.iprhelphdesk.eu/Fact-Sheet-Commercialising-IP-Knowledge-Transfer-Tools>
- *Fact sheet "Commercialising Intellectual Property: Assignment Agreements"*
<http://www.iprhelphdesk.eu/Fact-Sheet-Commercialising-IP-Assignment-Agreements>
- *Fact sheet "Commercialising Intellectual Property: Licence Agreements"*
<http://www.iprhelphdesk.eu/Fact-Sheet-Commercialising-IP-Licence-Agreements>
- *"IP Guide to Commercialisation"*
http://www.iprhelphdesk.eu/sites/default/files/documents/EU_IPR_Guide_Commercialisation.pdf
- *Fact sheet "Efficient resolution of disputes in R&D collaborations, licensing and other technology transfer"*
<http://www.iprhelphdesk.eu/Fact-Sheet-Alternative-Dispute-Resolution>

GET IN TOUCH

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ABOUT THE EUROPEAN IPR HELPDESK

The European IPR Helpdesk aims at raising awareness of Intellectual Property (IP) and Intellectual Property Rights (IPR) by providing information, direct advice and training on IP and IPR matters to current and potential participants of EU funded projects. In addition, the European IPR Helpdesk provides IP support to EU SMEs negotiating or concluding transnational partnership agreements, especially through the Enterprise Europe Network. All services provided are free of charge.

Helpline: The Helpline service answers your IP queries within three working days. Please contact us via registration on our website – www.iprhelppdesk.eu – phone or fax.

Website: On our website you can find extensive information and helpful documents on different aspects of IPR and IP management, especially with regard to specific IP questions in the context of EU funded programmes.

Newsletter and Bulletin: Keep track of the latest news on IP and read expert articles and case studies by subscribing to our email newsletter and Bulletin.

Training: We have designed a training catalogue consisting of nine different modules. If you are interested in planning a session with us, simply send us an email at training@iprhelppdesk.eu.

DISCLAIMER

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