

## Consortium Agreements: A Short FAQ

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### Q: Why do we need a Consortium Agreement?

A: An effectively drafted Consortium Agreement can, and should, fulfil multiple purposes within a project that will help to ensure that the process of producing project deliverables and the achievement of project outcomes are made as efficient as possible. It should not be viewed as simply a piece of administrative paperwork to be completed as an afterthought to the main work of the project – it should be completed in advance of that work and serve to underpin the process.

When constructing a JISC project with multiple parties, a Consortium Agreement provides both the institutions and the project team with a clear set of rules for managing the project, and for regulating issues relating to its operation amongst the project partners. If there is no Consortium Agreement, or the Consortium Agreement is unclear or inadequate, project partners and project staff may be unaware of the extent of institutional rights and obligations within the project, including ownership of existing and newly created intellectual property, and the project is likely to lack an effective management structure for its operational, technical and financial aspects. This may result in, for example:

- inappropriate decisions being made as regards the internal organisation and management of the project, including improper allocation of financial responsibilities;
- failure to properly assess the risk and liability accruing to project partners, leading to failure to make adequate provision, including insurance, for those risks and liabilities;
- an inability to settle internal disputes between project partners in a clearly understood, efficient and cost-effective manner;
- difficulties in handling the exit of existing project partners and the inclusion of new project partners;
- inadequate attention being paid to intellectual property rights, with the result that the usefulness and exploitability of project deliverables is compromised;
- difficulties in continuing the work of the project after the initial funding period has ended, due to lack of mechanisms for agreeing future development and funding options.

Project teams are often assembled after the funding has been obtained. A clear Consortium Agreement between partner institutions will set out clearly, at the earliest possible stage, the management and regulatory framework within which the project team members are to work. It also provides clear guidance to newcomers to the project team on the roles, rights and responsibilities within the project, in the event of staff turnover during the project lifetime. The need for clarity and comprehensibility in a Consortium Agreement cannot be overstressed – all project partners and project team members should be aware of their Consortium Agreement's content and its implications for their work.

### Q: When should we draw up our Consortium Agreement?

A: As early as possible in the project development process. As already noted, a well drafted Consortium Agreement can play a key role in the project process by providing a coherent

framework for operational development by the project team. It also requires the project partners to think carefully at an early stage about what they see their role within the project as being, and, if appropriate, where they would like it to go in the future. If the creation of a Consortium Agreement is left until later in the project process, it may become increasingly difficult to obtain agreement from project partners as to their respective responsibilities and future ambitions for project outcomes and deliverables. Equally, failure to agree issues relating to intellectual property at an early stage may result in unnecessary difficulties in use of intellectual property brought to the project by a project partner (often called 'background' intellectual property), and intellectual property created in the course of the project (often called 'foreground' intellectual property) during and after the project.

### Q: What should a Consortium Agreement contain?

A: The precise content of a Consortium Agreement will vary according to the nature and scope of the project at issue. While templates exist for drawing up Consortium Agreements, project partners should wherever possible avoid the approach of simply adopting a basic template and 'filling in the blanks', as this approach may well fail to address important issues specific to that individual project, or type of project. It is essential that each of the project partners spend adequate time assessing the construction of the Consortium Agreement in order to work through and understand the implications of the terms chosen, as regards their particular participation in the project.

It is also very important that project partners consider carefully at an early stage not just the operational elements of a Consortium Agreement (e.g. the terms which address the internal organisation and management of the project), but also the possible longer-term strategic elements – for example:

- what outputs and deliverables do the project partners intend to create, and what is the intended exploitation strategy for those outputs and deliverables?
- are the project partners likely to seek further funding to continue the work of the project after the initial funding ceases, and if so, from what sources?

An effective Consortium Agreement should allow the project partners the opportunity to review and address these strategic questions, and make provision for agreed adjustments to the terms of the Consortium Agreement to take account of future strategic developments.

In broad terms, the types of issues that it would be normal to expect a Consortium Agreement to address would include provisions to:

- ensure the technical implementation of the project, including the management structure and composition (e.g. project management, steering groups, etc.) required to ensure efficient and effective management of the operational, technical and financial aspects of the project;
- identify the lead institution, detail its role in administering the project funding according to decisions taken by the project partners, and describe the allocation of funding to project participants and to identified activities, including how, when and where funding will be allocated as well as to whom;
- provide potential solutions to problems relating to technical implementation (e.g. failure of a project partner to perform) and solutions to potential financial problems;
- allow for changes in project partner membership, including modification or extension of the Consortium Agreement to include further contributing partners;

- to describe, as precisely as possible, the way in which ‘background’ and ‘foreground’ intellectual property, will be used and/or disseminated by the project partners during, and where appropriate after, the course of the project. This will normally include at least some of the following issues:
  - allocation and exercise of ownership, including joint ownership;
  - setting out the terms of ‘use’ in a detailed and verifiable manner: e.g. who will exploit what, when and how, and such access rights as may be necessary;
  - granting additional or more favourable access rights, e.g. access rights to third parties, or specifying the requirements applicable to access rights, or excluding specific pre-existing know-how from the obligation to grant access rights
  - granting of sub-licenses (with the agreement of the party owning the licensed rights)
  - payment of royalties on access rights to the results or background
  - extending the period within which access rights are to be granted between project parties after the end of the project.

**Q: Can we have an example of a Consortium Agreement?**

A: The following example was drafted during the JISC MLEs for Lifelong Learning Programme, and contains clauses which have particular applicability to projects in that Programme, for example, clause 11.3 relating to Data Protection issues.

As noted above, it is poor practice to adopt Consortium Agreements from existing models or templates without:

- giving careful consideration to the applicability of the terms contained within them to the actual operational and strategic plans developed by project partners for particular projects; and
- ensuring that all project partners and members of the project team understand the requirements and implications of the terms adopted.

**EXAMPLE OF A BASIC CONSORTIUM AGREEMENT**

**GENERAL INFORMATION**

*[This section will identify each party to the Agreement.]*

**SUBJECT OF THE CONSORTIUM AGREEMENT**

*[This section will contain the title and an overview of the Project, including description of proposed Deliverables, linked to the contract with the Funding Body.]*

**IT IS HEREBY AGREED AS FOLLOWS:**

**1. INTERPRETATION**

In this Agreement the following words have the following meanings unless inconsistent with the context:

|                     |  |
|---------------------|--|
| “Background Rights” | all patents, designs, copyright (including copyright in software), database rights, and any other intellectual property rights excluding Foreground Rights, owned by any of the Partner Institutions, in the field and which are |
|---------------------|--|

necessary for the exploitation of Foreground Rights in accordance with this Agreement

|                                 |  |
|---------------------------------|--|
| “Business Day”                  | any day other than a Saturday or Sunday or a public or bank holiday in England & Northern Ireland  |
| “Commencement Date”             | <b>[Date]</b>  |
| “Confidential Information”      | all information that is marked as Confidential and that is disclosed by one Partner Institution to the others for the purpose of conducting the Project, including, without prejudice to the generality of the foregoing, any ideas; finance; financial, marketing, development or manpower plans; computer systems and software; products or services, including but not limited to know-how and information concerning relationships with other parties and all records, reports, documents, papers and other materials whatsoever originated pursuant to this Agreement |
| “Foreground Rights”             | shall mean all patents, designs, copyright (including copyright in software), database rights and any other intellectual property rights arising as a direct result of and in the performance of this Agreement  |
| “Project Intellectual Property” | together the Background Rights and Foreground Rights   |
| “Project Manager”               | the person appointed by the Steering Group to run the day-to-day operation of the Project  |
| “Partner Institutions”          | those educational institutions set out in General Information  |
| “Personnel”                     | any employee, director, agent, subcontractor or other person engaged by a Partner Institution,   |
| “Steering Group”                | the committee appointed to be responsible for managing the Project whose individual members are set out in <b>[Schedule 1]</b>   |

*[This section provides clear definitions for key terms in the Agreement, as appropriate]*

**2. LEAD INSTITUTION**

The lead institution in the Consortium is **[Lead Institution]**.

*[This section identifies the Lead Institution]*

**3. PURPOSE OF THE CONSORTIUM**

The purpose of the Consortium is:

- to carry out the Project and to produce the Deliverables as described under the heading “Subject of the Consortium Agreement” above;
- to seek additional funding for the development and exploitation of the Deliverables of the Project.

*[This section states the purpose of the Consortium, as decided by the Project Partners, which may be wider than simply carrying out the funded Project]*

#### 4. COMMENCEMENT AND DURATION

This Agreement shall commence on the Commencement Date and shall continue until the completion of the Project on **[Date]**.

The duration of this Agreement may be extended beyond **[Date]**, at any time prior to that date, by written agreement of the Partner Institutions, for such period or periods as are deemed appropriate.

*[This section states the starting date and duration of the Agreement but also makes provision for continuation of the Agreement after the initial funding period, should this be necessary]*

#### 5. OVERRIDING CONDITIONS

In all instances, until the completion of the Project, conditions laid down by the **[Funding Body]** or its successor will override any agreement between the Partner Institutions, including any terms contained in this Agreement.

*[A Funding Body may sometimes require, as part of the funding award contract, that a project Consortium Agreement contains a clause allowing the Funding Body to intervene in decisions made by the Project Partners]*

#### 6. PROJECT MANAGEMENT

##### 6.1 STEERING GROUP

There shall be a Steering Group established by the Partner Institutions and composed as set out in **[Schedule 1]**. The Steering Group shall appoint a Chair from amongst its members. There shall also be a Project Manager, who shall be Secretary to the Steering Group.

##### 6.2 RESPONSIBILITIES OF THE STEERING GROUP

###### 6.2.1 Project Oversight

The Steering Group shall be responsible for the delivery of the project outcomes and to this end will keep the project plan, and progress towards meeting it, under review.

###### 6.2.2 Appointment of Project Manager

The Steering Group shall be responsible for appointing a Project Manager. The Project Manager will have responsibility for the day to day management of the Project and will report to the Steering Group.

###### 6.2.3 Financial Management

The Steering Group shall be responsible for the financial management of the Project, and will manage the Project in accordance with appropriate project management techniques. The Steering Group may choose to take advice from third parties as required.

###### 6.2.4 Publications and Press Releases

The Steering Group shall decide procedures for dissemination of publications and press releases relating to the Project

###### 6.2.5 Commercial Exploitation Strategy

The Steering Group shall hold two Special Meetings, the first twelve months prior to the end of the Project, and the second at the end of the Project, whose business shall be exclusively to discuss the potential for the commercial exploitation of the Project Deliverables and the creation of Products based on those Deliverables. At these meetings the Steering Group shall review the Deliverables, discuss the potential for exploitation and the potential for development of Products from the Deliverables, and develop a strategy for such exploitation and development.

#### 6.2.6 Exit Strategy

The Steering Group shall establish a Sustainability Sub-Group to plan for the future development of the **[Deliverables]**.

The Steering Group shall hold two Special Meetings, the first twelve months prior to the end of the Project, and the second at the end of the Project, whose business shall be exclusively to develop a suitable strategy or strategies for future development of the **[Deliverables]**, including the pursuit of additional funding from appropriate sources.

In the event that additional funding is secured for future development of the **[Deliverables]**, the Steering Group shall be responsible for making such financial and administrative arrangements as are necessary to secure the effective and efficient continuation of the Consortium including any necessary revisions of this Consortium Agreement, for approval by the Partner Institutions.

#### 6.2.7 Division of Exploitation Income

The Steering Group will decide the division of income derived from exploitation of the Deliverables. The sharing of revenue applies to those Parties remaining at the end of the Project. If a Party withdraws or is expelled prior to the completion of the Project their entitlement to a share in the income derived from commercial exploitation will be determined by the Steering Group and will take account of the proportion of the total Project undertaken by that Party.

#### 6.3 STEERING GROUP MEETINGS

The Steering Group shall determine the frequency of its meetings, but shall meet at least twice yearly. Additional meetings may be called by two or more Partner Institutions or at the request of the Project Manager. Meetings will operate under the following rules:

- At each meeting, the Steering Group will agree on a date for the next meeting. Otherwise the Secretary, in consultation with the Chair or his nominee, shall call meetings, giving notice that is reasonable in the circumstances
- The Secretary shall circulate an agenda before the meeting
- Each Steering Group member (including the co-opted members, but not the Secretary) will have one vote, except the Chair who has a casting vote. A member may not vote on matters concerning a dispute with the Consortium where the member is the subject of the dispute.
- The quorum for a meeting will be five (5) voting members
- With the approval of the Chair, Steering Group members may nominate a representative to attend meetings and vote on their behalf
- Votes, with the exception of a vote to terminate a Partner Institution's membership of the Consortium, will be decided on the basis of a majority vote of those attending and eligible to vote

#### 6.4 RESPONSIBILITIES OF THE INDIVIDUAL MEMBERS OF THE STEERING GROUP

In addition to the Steering Group's collective responsibility, individual members of the Steering Group will have specific responsibilities as determined by the Steering Group from time to time.

*[This section deals with the management framework for the Consortium. In this case the management process is handled via a Steering Group and Project Manager, but Project Partners could choose a different management mechanism. The Steering Group in this example has a general oversight role over project progress, appoints the Project Manager, and is responsible for the financial management of the project. It plays a significant role in developing project strategy, including decisions on dissemination, commercial exploitation of Deliverables and the distribution of revenue from such exploitation, and planning for the end of*

**the initial period of funding. The section also details the Steering Group meeting procedures, and provides that Steering Group members will have both collective and individual responsibilities under the Agreement.]**

## 7. PROJECT RESOURCES

### 7.1 ALLOCATION

The total funding to be paid, subject to progress against Project milestones as agreed with the JISC, is as follows:

|   |         |
|---|---------|
| JISC Financial Year 1 ([Date] - [Date]) | £XXX,XX |
| JISC Financial Year 2 ([Date] - [Date]) | £XXX,XX |
| JISC Financial Year 3 ([Date] - [Date]) | £XXX,XX |
| JISC Financial Year 4 ([Date] - [Date]) | £XXX,XX |

### 7.2 DISTRIBUTION

Payments are made from the JISC to the **[Lead Institution]**. Thereafter **[Lead Institution]** shall apportion the budget between the Partner Institutions on the basis of financial plans approved from time to time by the Steering Group.

### 7.3 INVOICING/CLAIMS

Where claimable costs and expenses (that is, approved by the Project Manager or Steering Group) are incurred, claims should be passed to the Project Manager as soon as they have been paid with supporting evidence of the expenditure attached. The Project Manager will be required to make financial reports to the Steering Group from time to time.

**[This section describes what the project resources from the initial funding are, and how they will be distributed. In this example, the detailed financial planning is left largely to the discretion of the Steering Group, but it could instead have been dealt with within the Consortium Agreement itself]**

## 8. RESPONSIBILITIES OF THE PARTNER INSTITUTIONS

### 8.1 PERFORMANCE

During the period of this Agreement the Partner Institutions shall devote such of their time, attention and abilities to the Consortium's business as may be necessary for the proper performance of their duties under this Agreement. In particular, each Partner Institution undertakes to use all reasonable endeavours to:

- perform on time the tasks and work packages assigned to it
- participate actively with other Partner Institutions where necessary
- promptly notify the Project Manager and Steering Group of any delay in performance
- prepare and present reports as required.

The Partner Institutions shall ensure that the tasks and work packages assigned to them are performed by their Personnel with reasonable care and skill and to the best of the ability of the Personnel and that the Personnel shall at all times act with the utmost good faith towards the Consortium and other Partner Institutions.

The Partner Institutions shall be prepared to attend such locations as shall be necessary from time to time in the performance of their duties and will in all aspects diligently and faithfully obey and observe all directions of the Steering Group in relation to the tasks and work packages assigned to them and the Consortium's obligations to comply with the Funder's contractual requirements.

## 8.2 WARRANTIES AND UNDERTAKINGS

Each Partner Institution warrants that under its contractual relationships with each of its Personnel, any intellectual property rights arising out of or relating to work done by the Personnel for the Partner Institution will vest in the Partner Institution and that the Personnel will have no right, title or interest, whether legal or beneficial, in any such intellectual property rights. A Partner Institution shall, if so required by the Steering Group, produce written evidence of this to the Steering Group signed by its Personnel.

Each Partner Institution acknowledges that it is and shall remain liable for the consequences of any failure on its part or on the part of its Personnel to fulfil the tasks and work packages assigned to it under this Agreement and shall accordingly:

- procure and maintain its own insurance, with insurers of good repute, to cover its own liabilities and those on behalf of its Personnel;
- keep true and accurate records of all things done by its Personnel in relation to the tasks and work packages assigned to it under this Agreement
- comply and assist the Consortium, the Steering Group and the Project Manager in complying with all relevant statutes, laws, regulations and codes of practice relating to its tasks and work packages from time to time in force;
- comply with all recommendations and requirements of its insurers; and
- indemnify, keep indemnified and hold harmless the Consortium and other Partner Institutions from and against all costs (including the costs of enforcement), expenses, liabilities, injuries, direct, indirect or consequential loss (all three of which terms include, without limitation, pure economic loss, loss of profits, loss of business, depletion of goodwill and like loss), damages, claims, demands, proceedings or legal costs (on a full indemnity basis) and judgments which they incur or suffer as a result of a breach of this Agreement or negligent acts or omissions or wilful misconduct of the Partner Institution and/or its Personnel including without limitation any resulting liability the Consortium has to the Funder or to any third party.

Each Partner Institution shall be responsible for providing all appropriate facilities and services as shall be necessary in the proper performance of the tasks and work packages, which will be entirely at the Partner Institution's own expense.

Each Partner Institution agrees and undertakes at its own expense to make the Personnel available to attend a Working Group meeting with the Project Manager to review progress at such times and locations as the Steering Group shall reasonably specify.

Each Partner Institution shall provide the Steering Group with:

- quarterly statements of expenditure incurred in relation to the provision of the tasks and work packages assigned to it, together with copies of staff timesheets, invoices and other relevant documentation for audit purposes;
- a declaration that confirms that expenditure has been incurred in accordance with the Funding Agreement; and
- a final statement of expenditure within 4 weeks of the termination of this Agreement.

**[This section outlines the responsibilities of the Project Partners - these may vary according to the nature and scope of the Project. It includes warranties and undertakings between the Project Partners on issues including intellectual property, insurance, record keeping, and legal compliance, as well as an indemnity provision to protect the Project Partners from financial and other damage arising from acts or omissions on the part of any of the Partners. It also makes provision for a Project Working Group without fixed membership to be convened, at the discretion of the Steering Group, to review progress. Finally, it deals with issues of Project Partner financial accountability, and record keeping.]**

## 9. ADDITION OF PARTNER INSTITUTIONS TO THE CONSORTIUM

Institutions may be invited to join the Consortium only by the unanimous decision of the Steering Group and on the condition that the new institution becomes a party to this Agreement.

*[This section makes provision for third party institutions to join the Consortium. The conditions laid down for joining may vary according to the nature and scope of the Project. In this case, for a third party to join the Consortium they must agree to the same terms and conditions as the original Parties. As such, an agreement for a third party to join the Consortium which did not meet those criteria would not be valid, unless the Project Partners agreed to amend this Consortium Agreement accordingly.]*

## 10. REMOVAL OR WITHDRAWAL OF PARTNER INSTITUTIONS FROM THE CONSORTIUM

### 10.1 REMOVAL OF PARTIES

Without prejudice to any other rights or remedies open to the Consortium, the Steering Group may, after a two-thirds majority vote of the full Steering Group in favour of termination, and via a written notice served on the Partner Institution, terminate a Partner Institution's membership of the Consortium, if the Partner Institution:

- is in material breach of any of the terms of this Agreement and, where the breach is capable of remedy, the Partner Institution fails to remedy such breach within 30 days' service of a written notice specifying the breach and requiring it to be remedied; or
- in the opinion of a majority of the Steering Group, is incompetent, commits any act of gross or persistent misconduct and/or neglects or omits to perform any of its duties or obligations under this Agreement; or
- fails or refuses after written warning from the Steering Group to carry out the duties or obligations reasonably and properly required of it under this Agreement; or
- being a company, summons a meeting of its creditors, makes a proposal for a voluntary arrangement, becomes subject to any voluntary arrangement, is unable to pay its debts within the meaning of s.123 Insolvency Act 1986, has a receiver, manager or administrative receiver appointed over any of its assets, undertaking or income, has passed a resolution for its winding-up (save for the purpose of a voluntary reconstruction or amalgamation), is subject to a petition presented to any court for its winding-up (save for the purpose of a voluntary reconstruction or amalgamation), has a provisional liquidator appointed, has a proposal made for a scheme of arrangement under s.425 Companies Act 1985, has an administrator appointed in respect of it or is the subject of an application for administration filed at any court or a notice of appointment of an administrator filed at any court or a notice of intention to appoint an administrator given by any person or is the subject of a notice to strike off the register at Companies House;
- ceases to operate its business or undertaking;
- provides the Steering Group with any false or misleading information with regard to its ability to perform its duties or obligations under this Agreement; or
- has done anything which brings or might reasonably be expected to bring the Partner Institutions or the Project or the Funder into disrepute or otherwise damage other contractors, employees, agents, customers, other business associates or the general public including, but not limited to, committing an act of fraud or dishonesty, whether or not connected with the Project.

## 10.2 WITHDRAWAL OF PARTNER INSTITUTIONS

A Partner Institution may withdraw from the Consortium only with the unanimous agreement of the remaining Partner Institutions.

### 10.3 CONDITIONS CONSEQUENTIAL ON REMOVAL OR WITHDRAWAL

In the event of withdrawal or expulsion of a Partner Institution, the Consortium will be liable to meet only the cost of any work undertaken up to the point at which a Partner Institution ceases to be a member of the Consortium. The balance of any payments made to the Partner Institution will be returned to the nominated representative of **[Lead Institution]** within 30 days of withdrawal or expulsion. In all cases, the Consortium reserves the right of access to any work produced in the course of the Partner Institution's work as part of the Consortium.

*[This section makes provision for removal or withdrawal of Project Partners from the Consortium. In the case of removal, it provides a set of clear grounds that would justify removal and a specific procedure that must be followed. The section also makes provision for determining the financial outcomes of withdrawal or expulsion, and ensures that work carried out by an expelled or withdrawn partner remains accessible to the remaining Project Partners. This should be read in conjunction with the Intellectual Property provisions below]*

## 11. DATA MANAGEMENT

### 11.1 DATA COLLECTION

In the course of the Project, each Partner Institution is involved in the production and collection of data in the form of **[description]**. The data are to be sent to the Project Manager and stored in an archive at **[Institution/Project Partner]** ("the Project Archive"). Each Partner Institution agrees to ensure that all data submitted to the Project Manager are accompanied by documentation detailing the origin of the data, together with any necessary consents.

### 11.2 DATA MAINTENANCE

The **[Institution/Project Partner]** hereby undertakes to maintain the Project Archive for the duration of the Project and for a period of at least three (3) years after the end of the Project. This period is subject to extension if the Steering Group so decides.

### 11.3 DATA PROTECTION

As a member of the Consortium, each Partner Institution will be processing personal data for the purpose of the **[Project]**. Each Partner Institution must be a signatory of the **[Project]** Data Controllers Agreement, and must sign a Data Processing Agreement with the **[Institution/Project Partner]**, prior to processing personal data for the purposes of the Project.

*[This section makes provision for data management within the Project, in terms of archiving and preservation of both project administrative data and project outputs. This may be particularly important from the Funding body's perspective, but also in terms of ongoing project management and future strategic planning. The section on data protection may, or may not, be necessary depending upon the nature and scope of the Project. It links the Consortium Agreement to a further set of DP-specific Agreements]*

## 12. CONFIDENTIALITY

Each Partner Institution hereby undertakes to the other Partner Institutions that it shall procure that its employees, agents and sub-contractors shall:

- keep confidential all information of a confidential nature (whether written or oral) concerning this Agreement and the business affairs of another Partner Institution that it shall have obtained or received as a result of the discussions leading up to or entering into or performance of this agreement (the "Information");

- not without the prior written consent of the relevant other Partner Institution disclose the Information either in whole or in part to any other person save those of its employees, agents and sub-contractors involved in the implementation or evaluation of the Project who have a need to know the same for the performance of their duties;
- use the Information solely in connection with the implementation of the Project and not otherwise for its own benefit or the benefit of any third party.

These provisions above shall not apply to the whole or any part of the Information to the extent that it can be shown by the receiving Partner Institution to be:

- known to the receiving Partner Institution prior to the date of this Agreement and not obtained directly or indirectly from any other party; or
- obtained from a third party who lawfully possesses such Information which has not been obtained in breach of a duty of confidence owed to any party by any person; or
- in the public domain in the form in which it is possessed by any other party other than as a result of a breach of a duty of confidence owed to such other party by any person; or
- required to be disclosed by legal process, law or regulatory authority.

Each Partner Institution hereby undertakes to the other Partner Institutions to make all relevant employees, agents and sub-contractors aware of the confidentiality of the Information and provisions of this clause and without prejudice to the generality of the foregoing to ensure compliance by such employees, agents and sub-contractors with the provisions of this clause

***[This is a standard confidentiality clause. It is important that if information of a confidential nature is to be made available between Project Partners, that the providing Partner makes it quite clear that it is to be considered confidential, and that the other Project Partners take all necessary steps to ensure that confidentiality is respected.]***

## 13. INTELLECTUAL PROPERTY

### 13.1 ASSIGNMENT AND WARRANTIES

Each Partner Institution shall obtain the necessary assignments of intellectual property rights (this term includes, but is not limited to, copyright, database right, patents and trademarks) from all staff, agents, or sub-contractors involved in the development and production of the Deliverables on its behalf. Each Partner Institution warrants to the other Partner Institutions that it is the owner of the IPRs in the Deliverables, or that it is duly licensed to use the Deliverables, and that the use of the content of the Deliverables as contemplated in this Agreement does not infringe any IPRs or other proprietary or rights of any natural or legal person.

### 13.2 BACKGROUND RIGHTS

All Background Rights used in connection with this Agreement shall remain the property of the Partner Institution introducing the same.

### 13.3 FOREGROUND RIGHTS

All Foreground Rights arising from this Agreement shall belong to the Partner Institution generating the same.

### 13.4 ACCURACY

Each Partner Institution shall use reasonable endeavours to ensure the accuracy of any information or materials that it supplies to the other Partner Institutions under this clause and shall promptly correct any error therein of which it is notified. The donating Partner Institution will provide no warranties to recipient Partner Institutions in respect of the information and materials, and the recipient Partner Institutions shall be entirely responsible for the use to which they put such information and materials.

## 13.5 ACCESS RIGHTS

Each Partner Institution hereby grants to the other Partner Institutions a royalty-free, non-exclusive, worldwide, irrevocable, assignable, perpetual licence to use its Project Intellectual Property for the purpose of performing their part of the Project.

Each Partner Institution hereby indemnifies the other Partner Institutions against any liabilities, loss, claims or expenses brought against or incurred as a result of its use of and/or sale of products containing the other Partner Institutions' Project Intellectual Property.

After completion of the Project all Partner Institutions shall continue to have the right to use the Project Intellectual Property at no cost for the purposes of exploiting the materials in the carrying out of their usual educational activities.

After completion of the Project the Consortium shall provide on request, to any educational institution (as defined by s.65(5) of the Further and Higher Education Act 1992), a free copy of the Deliverables and a non-exclusive free licence to use the Deliverables for non-commercial purposes."

Use of Project Intellectual Property by third parties other than Partner Institutions, and by educational institutions (as defined by s.65(5) of the Further and Higher Education Act 1992) for commercial purposes, shall be at the discretion of the Partner Institution owning such Project Intellectual Property.

## 13.6 TERMINATION OF THE AGREEMENT

Any intellectual property right licences granted under this clause shall survive the termination of this Agreement.

## 13.7 FUNDING AGREEMENTS

The provisions of this clause shall at all times be subject to any conflicting provisions in the Funding Agreement, and in the event of any conflict, the Funding Agreement shall prevail.

***[This section deals with the issue of intellectual property. The intellectual property sections of a Consortium Agreement will be extremely important in terms of the development of a project and any future exploitation of project Deliverables, and it is vital that Project Partners are clear about the implications of their respective rights and obligations as outlined within it.]***

## 14. TERMINATION

### 14.1 TERMINATION OF FUNDING

This Agreement shall terminate immediately with no liability between the Partner Institutions should the Funding Agreement terminate for any reason whatsoever, unless the Partner Institutions, by means of written agreement, decide to continue it.

### 14.2 TERMINATION BY MUTUAL AGREEMENT

This Agreement may be terminated at any time by the unanimous written agreement of the Partner Institutions.

### 14.3 RIGHTS OF PARTIES

The termination of this Agreement, howsoever arising, is without prejudice to the rights, duties and liabilities of the Partner Institutions accrued due prior to termination. The provisions in this Agreement which expressly or impliedly have effect after termination shall continue to be enforceable notwithstanding termination.

***[This section outlines the conditions under which the Agreement may be terminated, other than its completion as set out in clause 4 'Commencement and Duration', and the implications of Termination for the Project Partners.]***

## 15 DISPUTE RESOLUTION

### 15.1 GOVERNING LAW AND JURISDICTION

The formation, existence, construction, performance, validity and all aspects whatsoever of this Agreement or of any term of this Agreement shall be governed by **[jurisdiction]**. The **[jurisdiction]** courts shall have exclusive jurisdiction to settle any disputes which may arise out of or in connection with this Agreement. The Partner Institutions agree to submit to that jurisdiction.

### 15.2 ARBITRATION

The Partner Institutions agree to refer any disputes arising from this Agreement to final and binding arbitration via a mutually agreed independent third party.

Any person to whom a reference is made under this sub-clause shall act solely as an arbitrator and their decision (which shall be given in writing and shall state the reasons for the decision) shall be final and binding on the parties to the dispute except in the case of manifest error or fraud.

Each party shall provide the arbitrator with such information and documentation as s/he may reasonably require for the purposes of his/her decision.

The costs of the arbitrator shall be borne by the parties to the dispute in such proportions as they shall agree in advance.

*[This section provides a mechanism for resolving disputes between the project partners which cannot be resolved within the Consortium (i.e. in this case, by the Steering Group). This example envisages a simple binding arbitration process, but there are a wide range of alternative options for those drafting Consortium Agreements to choose between, including more formal arbitration processes. It is important to consider carefully which model of dispute resolution best suits the arrangements for a particular project. The section also determines which jurisdiction's law will be used when there is any dispute about, or arising from, the Agreement. It also states which country's courts should have jurisdiction to hear any case arising from, the Agreement.]*

## 16 GENERAL PROVISIONS

### 16.1 SOLE AGREEMENT

Subject to clause 5 this Agreement contains all the terms which the Partner Institutions have agreed in relation to the subject matter of this Agreement and supersede any prior written or oral agreements, representations or understandings between the parties relating to such subject matters.

No Partner Institution to this Agreement has been induced to enter into this Agreement by a statement or promise which it does not contain save that this clause shall not exclude any liability which one party would otherwise have to the other in respect of any statements made fraudulently by that party.

### 16.2 SCHEDULES

The Schedules shall have the same force and effect as if expressly set in the body of this Agreement and any reference to this Agreement shall include the Schedules.

### 16.3 WAIVER

No failure or delay by any Partner Institution to exercise any right, power or remedy will operate as a waiver of it nor will any partial exercise preclude any further exercise of the same, or of some other right, power or remedy.

### 16.4 SEVERABILITY

If any clause or part of this Agreement is found by any court, tribunal, administrative body or authority of competent jurisdiction to be illegal, invalid or unenforceable then that provision shall, to the extent required, be severed from this Agreement and shall be

ineffective without, as far as is possible, modifying any other clause or part of this Agreement and this shall not affect any other provisions of this Agreement which shall remain in full force and effect.

### 16.5 FORCE MAJEURE

No Partner Institution will be deemed to be in breach of this Agreement, nor otherwise liable to the other for any failure or delay in performance of this Agreement if it is due to any event beyond its reasonable control other than strike, lock-out or industrial disputes but including, without limitation, acts of God, war, fire, flood, tempest and national emergencies and a Partner Institution so delayed shall be entitled to a reasonable extension of time for performing such obligations.

### 16.6 ASSIGNMENT AND SUBLETTING

A Partner Institution shall not assign, sublet or contract all or any part of the liability, obligation or benefit under this Agreement without the express prior written consent of the other Partner Institutions.

### 16.7 VARIATION

This Agreement may be amended at any time by written agreement of the Partner Institutions. No variation to this Agreement shall be effective unless in writing signed by a duly authorised officer of each of the written Partner Institutions. Any variation during the term of the Project shall be subject to the approval of the Funder.

### 16.8 NOTICE

Any notice in connection with this Agreement shall be in writing and may be delivered by hand, pre-paid first class post, Special Delivery post, or facsimile (but not by e-mail), addressed to the recipient at its registered office or its address or facsimile number as the case may be (or such other address, or facsimile number as may be notified in writing from time to time).

The notice shall be deemed to have been duly served:

- if delivered by hand, when left at the proper address for service;
- if given or made by prepaid first class post or Special Delivery post, 48 hours after being posted or in the case of Airmail 14 days after being posted (excluding days other than Business Days);
- if given or made by facsimile, at the time of transmission, provided that a confirming copy is sent by first class pre-paid post to the other party within 24 hours after transmission;

provided that, where in the case of delivery by hand or transmission by facsimile, such delivery or transmission occurs either after 4.00 p.m. on a Business Day, or on a day other than a Business Day, service shall be deemed to occur at 9.00 a.m. on the next following Business Day (such times being local time at the address of the recipient).

*[This section contains general provisions concerning the operation of the Consortium Agreement. For example, clause 16.4 provides that failure of one part of the Agreement does not invalidate the whole Agreement, clause 16.7 allows Project partners to amend the Agreement but only under specific conditions, and clause 16.8 covers the form that communications concerning the Agreement (i.e. not general day-to-day project messages, but messages specifically relating to the Agreement) should take, and when such communications will be considered to have been received.]*

#### SCHEDULE 1 - Composition of Steering Group.

[List]

**Q: This all sounds a bit complicated - should we seek further advice about our Consortium Agreement, and from where?**

A: Many institutions will have an institutional contracts officer, or similar post. It is sensible to involve them in discussions about the Consortium Agreement at an early stage, in order that any problematic legal issues can be properly addressed. There are often institutional policies as regards the nature of agreements that an institution is willing to enter into, for example with regard to the scope of warranties, undertakings and acceptance of liabilities. There are also likely to be policies about the handling of intellectual property matters, notably issues of acquiring and licensing-out intellectual property rights. Other institutional officers may also wish to be informed about, and provide input into, the process, e.g. Data Protection Officers, in projects where personal data is to be processed. The larger the scale of funding, and the larger the number of potential Project Partners, the more important it becomes that the Consortium Agreement is subjected to professional scrutiny to ensure that it meets the requirements of the Funding Body and Project Partners. Your institution will be in the best position to determine at what stage, if any, that scrutiny should include review by its solicitors.

**This document is a work in progress. If you would like to see this FAQ cover other areas of law, address existing areas in more detail, or answer specific questions, or indeed if you would like to contribute to it, please contact the researchers at:**

**Email:** <A.J.Charlesworth@bris.ac.uk> or <Anna.Home@bristol.ac.uk>

**Address:** The Law School, University of Bristol, Wills Memorial Building, Queens Road, Bristol BS8 1RJ

**New discussion list:** EPORT-LEGAL@jiscmail.ac.uk

**See** <<http://www.jiscmail.ac.uk/lists/EPORT-LEGAL.html>>