

Guidelines for a Consortium Agreement (CA)

The CA is an agreement made between participants in a collaborative project to govern a number of issues, i.e. relationship between partners, organisation and implementation of the project, as well as rights and obligations between participants. Partners may not underestimate time needed in the elaboration of such a document, especially if it is the first time. They are encouraged to start thinking about it at the early stages of the project definition. A well prepared CA minimizes the probability of later disputes. The aim of a CA is to remove potential barriers for cooperating on project level and ensuring equitable use of project results. Therefore:

- all project partners contribute to, and benefit from, an equitable and balanced cooperation and;
- results of collaborative projects are shared through a controlled process that protects and equitably allocates any intellectual property rights created or furnished during cooperation.

A draft of the Consortium Agreement is recommended to be in place when the funding negotiations commence; some agencies might require a Consortium Agreement in order to release funds. Please contact your national contact partners for more information.

The CA needs to be sufficiently detailed in order to show that all will be set-up to ensure a well-balanced cooperation. A checklist for the redaction of a CA is provided below. The aim of this checklist is to summarise and explain the main items to be covered in a CA to be signed between the participants involved in the same project. Further to the checklist provided several CA models are furnished on DESCA's webpage (<http://www.desca-fp7.eu/>). EMIDA applicants might use one of them to draft their own Consortium Agreement. The most suited model might be "Example 1".

Please note: Applicants who would like to use this model to draft their Consortium Agreement should please adjust it to the specificities of their project. Especially the preamble part on page 3 of "Example 1" should be adapted in order to fit the funded project, since in EMIDA projects funding of project partners is provided by the participating national funding bodies according to their individual national regulations. Thus, the Consortium Agreement should not refer to the EC-Grant Agreement but to the single grant/loan agreements of the project partners.

Consortium Agreement Checklist

1. Parties

- Identify all the participating parties and their official representatives.

2. Preamble

- Describe the context of the cooperation, its objectives and scope (including the title and acronym – where applicable - of the project).
- Define the purposes of the consortium agreement (i.e. to specify the relationship among the parties, in particular concerning the organisation of the work between the parties, the management of the EMIDA project and the rights and obligations of the parties, liability, intellectual property rights and dispute resolution).

3. Definition

- Define the key legal and technical terminology in order to avoid misunderstanding.
- List the annexes.

4. Implementation

- Describe the EMIDA project in general terms and refer to technical annexes for details, including work packages, allocation of tasks, milestones and planning of the project.
- Define the foreseen achievements in terms of deliverables.
- Define the application domain of the project results.
- Describe the technical responsibility and contribution (personnel, facilities, equipment, materials, etc.) of each party in the implementation of the project.
- Indicate how much and what kind of assistance parties are obliged to give to each other in order to secure the proper execution of the project.
- Determine reports (i.e. financial, technical) to be submitted and timetable.

5. Changes

- Sets out provisions for dealing with changes to the project.

The CA may have to be adjusted or even discarded altogether as the work progresses, depending on the situation. To deal with highly volatile situations, it is advisable to provide a very flexible procedure for making changes to the initial specifications. This could go as far as including the termination of certain tasks, the withdrawal of certain parties, and the inclusion of new partners. To avoid disputes, the conditions and procedure should be clearly indicated.

6. Organisation/Management

- Define the duties and responsibilities of each party from an administrative, legal, financial and technical point of view. Specify additional duties of the consortium coordinator.
- Define the internal organisation of the consortium (e.g. management bodies, committees and/or working groups; communication between the parties, prior notification, etc.).
- Describe the different bodies: role and internal rules (i.e. how are the members appointed? How are decisions taken? How many and when will meetings be organized?).
- Each party undertakes to follow the production schedule specified in the technical annexes. In view of the evolving character of many projects, these production timetables are generally subject to change. However, the risk of uncontrolled time and cost escalation is very real in many projects. To limit this risk, it is desirable to provide for a strict and effective inspection and supervision system:
 - Define the procedures set up to monitor the project from a scientific, technical and financial point of view.
 - Describe procedures in case of additional tasks or review of the initial work plan.
 - Determine conditions under which existing parties may withdraw from the project, or reduce or increase their contribution.
 - Indicate to which extent subcontracting is possible.
 - Define conditions under which additional parties may join the project.

7. Financial Issues

- Indicate the total budget of the project and the planning of expenses for each party.
- If the planning is not observed, how and to which extent may the schedule and budget be adjusted?
- Indicate any national requirements (e.g. financial reports).

8. Provisions regarding Intellectual Property Rights (IPR), Dissemination and Use

- Describes additional provisions on IPR, use and dissemination.

The basic principle applied in drafting these provisions is to provide a flexible and efficient mechanism to support the co-operation between the parties, to encourage protection and maximum use of foreground as well as to ensure swift dissemination thereof. More information about these provisions can be found on www.iprhelppdesk.eu.

8.1 Confidentiality and publications

- Determines the confidentiality obligations and limits thereof, such as:
 - What information is considered confidential (i.e. scope and exceptions).

- What steps/procedures must be taken to mark and transfer confidential information.
- To whom the confidential information may be divulged and under which conditions.
- The period during which the confidentiality obligations must be respected (See also chapter "Survival" below).
- Define to which extent publications of the project results are allowed and under which conditions.

8.2 Ownership and protection of the pre-existing know-how and project results

- Determine which and how pre-existing know-how (protected or not) has to be exchanged for the proper execution of the project.
- Define how the property of the project's results will be allocated between the parties and which will be the geographic coverage.
- Describe how joint ownership will be managed.
- Define conditions under which property of pre-existing know-how and project results may be transferred between the parties and towards third parties (notably affiliated entities).
- Indicate how the project's results will be protected (type of protection, duration, etc.).

8.3 Access rights to and exploitation of pre-existing know-how and project results

- Define fair and reasonable conditions for access rights (including financial conditions, if any) to be granted to use the pre-existing know-how and project results (protected or not) during the implementation of the project. If no agreement is reached by all the participants before their accession to the CA such access rights shall be royalty-free.
- Define the access rights (including financial conditions, if any) to be granted for exploitation of the project's results.
- Define the conditions for access rights to pre-existing know-how for use, i.e. in further research or in commercial exploitation (either under fair or reasonable conditions or royalty-free).
- Determine any access rights to the pre-existing know-how by affiliates.
- Determine if and to which extent exclusive license may be granted between the parties and towards third parties.
- May sub-licenses be granted?
- Indicate whether access rights to third parties or affiliates are possible.
- Indicate how the parties will exploit the project results, i.e. jointly or separately.
- Indicate conditions for exploitation by third parties.
- Define potential royalties, or at least principles for agreeing on potential royalties.

9. Liability

- Indicate to what extent a party causing damages or injury to another party or to goods or persons will be held liable.

- Define possible actions and financial penalties in case of damage or injury, including in case of withdrawal, fault or dismissal from the consortium?
- Define actions, solutions, penalties in case of bankruptcy.
- Provide for actions and remedies in case of force majeure.

10. General Provisions

10.1 Entry into force

- Determines the effective date of entry into force of the CA (consequences if not all parties accede to effective funding by their respective agency). Indicate whether part or all of its provisions are concerned.

10.2 Duration / Termination

- Deals with the duration of the CA and with the causes of early termination and addresses issues such as:
 - Duration of the CA vs. duration of the project.
 - Possibility of tacit renewal and extension.
 - Automatic termination after full completion of the project.
 - Termination prior to full completion, for example if a partner steps out of the project without having finished his part of the work.
 - Termination due to breach.
 - Consequences of different reasons of termination (e.g. return of documents).

10.3 Amendments to the CA

- Provides simple and clear conditions and procedures for the amendment or revision of the CA, in particular relating to:
 - The withdrawal of parties (withdrawal of a party should normally not mean the automatic termination of the CA).
 - The admission of new parties (e.g. by means of an amendment).
 - The expulsion of parties (including regarding the procedure to be followed when the consortium wants to request the termination of a party and provisions regarding confidentiality obligations after departure).
 - Revisions of important provisions.

10.4 Breach / non-compliance and associated liability, indemnification or penalties

- Sets out what constitutes a breach of the obligations under the CA and its consequences, i.e.:
- What constitutes a breach and the procedure to be followed (including for example, a requirement to give notice identifying the breach and providing for the possibility of the defaulting party to rectify such a breach within a given period).
- Liability (and possible limitations/force majeure) for damage caused and indemnification thereof.

- Possible penalties or liquidated damages for non-compliance (the conditions under which they are due should be clearly stipulated (e.g. regarding amounts, the procedure, the interest in case of delay of payments, etc)).
- Possible termination of the CA vis-à-vis the party concerned (any effects on the project will have to be addressed).

10.5 Survival

- Sets out which provisions survive the duration of the CA, such as those regarding:
 - Confidentiality and, if applicable, classification.
 - Applicable law and jurisdiction.
 - Access rights provisions.
 - Use of project Acronym (especially if this sign is protected as a trademark or a domain name for this sign has been registered).

10.6 Partial invalidity

- Deals with the consequences of invalidity of certain provisions of the CA.

10.7 Applicable law and jurisdiction

- Determines which law governs the CA and which forum must be used for conflict resolution.

The law chosen to settle disputes is frequently the national law of one of the parties. However, any national law can be chosen. The CA may also stipulate that the terms of international trade will be applied, although it is preferable that a national law is chosen on a subsidiary basis to avoid any gaps.

The jurisdiction/forum chosen to settle disputes can be a national court or an alternative dispute resolution mechanism such as arbitration. If arbitration is chosen, the CA will have to determine some or all characteristics of the procedure to be followed (e.g. relating to the arbitration site, the selection and number of arbitrators or the discovery and expertise process).

10.8 Number of copies, languages and signature process

- Sets out the number of copies of the CA and language(s) (if more than one language is used it is preferable to determine the language version which shall prevail in case of dispute).
- Determines the signature process (separate signature page, counterparts, etc).