

WG3.1: Intellectual Property issues in H2020 (including third parties) based on the Rules for Participation, Model Grant Agreements and model Consortium Agreement (DESCA) – Part 1

- a) Legal definitions concerning IP being brought to the project or generated during its life-time (including major differences between the definitions used under FP7 and H2020)*

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Documents related to IP in EU funded research projects

Rules for Participation

- Regulations (EC) of the European Parliament and of the Council
- Lays down specific rules for funding, participation and for the dissemination and exploitation of results
- Applies to all parts of Horizon 2020 (and FP7)

Grant Agreement

- Agreement between Commission and coordinator + the other beneficiaries of the project

Consortium Agreement (CA) / DESCA

- Contract between all the project beneficiaries
- CA covers issues that are important in managing the project, e.g. concerning the IPRs and publishing
- CA is negotiable but may not be in contradiction with GA
- DESCA model CA is based on the Rules for Participation
- Please note: DESCA is not the only CA model - there is also other CA models, e.g. MCARD, but the model most suitable for universities and research institutes is DESCA (includes many essential provisions, e.g. on rights, liabilities and publishing)

Essential IP definitions used in the Rules for Participation, Grant Agreement and DESCA under FP7 and H2020

FP7	H2020
"Background"	"Background"
"Foreground"	"Results"
"Use"	"Exploitation"
"Access Rights"	"Access Rights"
"Needed"	"Needed"

- Terms "Background", "Foreground"/"Results", "Use"/"Exploitation" are the main subject to this presentation. More detailed definition of the terms "Access Rights" and "Needed" will be covered on later presentations today.
- Focus of this presentation will be on H2020
- Some of the definitions are included in the Rules for Participation and GA, some only in DESCA



1) Definitions in Desca

Document	DESCA	
Definition / Term	FP7	H2020
<p>FP7: Background, Foreground, Exploitation, Access Rights</p> <p>H2020: Background, Results, Use, Access Rights</p>	<p>Words beginning with a capital letter shall have the meaning defined either herein or in the Rules for Participation or in the Grant Agreement including its Annexes without the need to replicate said terms herein.</p>	<p>Words beginning with a capital letter shall have the meaning defined either herein or in the Rules for Participation or in the Grant Agreement including its Annexes.</p>
<p>FP7: Needed</p> <p>H2020: Needed</p>	<p>For the implementation of the Project: Access Rights are Needed if, without the grant of such Access Rights, carrying out the tasks assigned to the recipient Party would be impossible, significantly delayed, or require significant additional financial or human resources.</p> <p>For Use of own Foreground: Access Rights are Needed if, without the grant of such Access Rights, the Use of own Foreground would be technically or legally impossible.</p>	<p>For the implementation of the Project: Access Rights are Needed if, without the grant of such Access Rights, carrying out the tasks assigned to the recipient Party would be impossible, significantly delayed, or require significant additional financial or human resources.</p> <p>For Exploitation of own Results: Access Rights are Needed if, without the grant of such Access Rights, the Exploitation of own Results would be technically or legally impossible.</p>

- Needed is explicitly defined only in DESCA – not in the Rules for Participation, not in the Grant Agreement



2) “Background”

Document Definition / Term	Rules for Participation		Grant Agreement	
	FP7 – No 1906/2006	H2020 – No 1290/2013	FP7 Grant Agreement – Annex II – General Conditions	H2020 General Model Grant Agreement
<p>FP 7: Background</p> <p>H2020: Background</p>	<p>Information which is held by participants prior to their accession to the grant agreement, as well as copyrights or other intellectual property rights pertaining to such information, the application for which has been filed before their accession to the grant agreement, and which is needed for carrying out the indirect action or for using the results of the indirect action. Participants may define the background needed for the purposes of the indirect action in a written agreement and, where appropriate, may exclude specific background.</p>	<p>Any data, know-how or information whatever its form or nature, tangible or intangible, including any rights such as intellectual property rights, which is: (i) held by participants prior to their accession to the action; (ii) needed for carrying out the action or for exploiting the results of the action; and (iii) identified by the participants. Participants shall identify the background for their action in any manner in a written agreement.</p>	<p>Information which is held by beneficiaries prior to their accession to this agreement, as well as copyrights or other intellectual property rights pertaining to such information, the application for which has been filed before their accession to this agreement, and which is needed for carrying out the project or for using foreground.</p>	<p>Any data, know-how or information – whatever its form or nature (tangible or intangible), including any rights such as intellectual property rights – that: (a) is held by the beneficiaries before they acceded to the Agreement, and (b) is needed to implement the action or exploit the results.</p>

“Background” – Remarks (1/2)

FP 7 Grant Agreement – Annex II – General Conditions / Art. II.31.: Beneficiaries *may* define the background needed for the purposes of the project in a written agreement and, where appropriate, may agree to exclude specific background.

- Both positive and negative lists are acceptable.

H2020 General Model Grant Agreement / Article 24.1: The beneficiaries *must* identify and agree (in writing) on the background for the action (“agreement on background”).

The beneficiaries are strongly advised to agree on background before the GA is signed, to ensure that they have access rights to what is needed.

May be any tangible or intangible input (from data to know-how, information or rights) that exists before the GA is signed and that is needed to implement the action or to exploit its results.

- Examples: prototypes, cell lines, patents, database rights.
- For intellectual property rights, it suffices that the application was filed before the GA is signed.
- Background is not limited to input owned, but potentially extends to anything the beneficiaries lawfully hold (e.g. through a licence with the right to sub-licence). Background also extends to input held by other parts of the beneficiary’s organisation.
 - If a university department participates in the action, background could potentially be anything held by the university (unless the department has its own legal personality and is the beneficiary).

“Background” – Remarks (2/2)

May take any form: Both positive and negative lists are acceptable.

May be a separate agreement or part of the CA.

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).

One option is that a party excludes everything: No background of the beneficiary shall be needed by another party.

If access to background is subject to legal restrictions or limits, the beneficiary must inform the other beneficiaries.



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3) “Foreground” / “Results”

Document Definition / Term	Rules for Participation		Grant Agreement	
	FP7 – No 1906/2006	H2020 – No 1290/2013	FP7 Grant Agreement – Annex II – General Conditions	H2020 General Model Grant Agreement
FP 7: Foreground H2020: Results	The results, including information, whether or not they can be protected, which are generated by the indirect action concerned. Such results include rights related to copyright, design rights, patent rights, plant variety rights or similar forms of protection.	Any tangible or intangible output of the action, such as data, knowledge or information, that is generated in the action, whatever its form or nature, whether or not it can be protected, as well as any rights attached to it, including intellectual property rights.	The results, including information, whether or not they can be protected, which are generated under the project. Such results include rights related to copyright; design rights; patent rights; plant variety rights; or similar forms of protection.	Any (tangible or intangible) output of the action such as data, knowledge or information – whatever its form or nature, whether it can be protected or not – that is generated in the action, as well as any rights attached to it, including intellectual property rights.

“Foreground” / “Results” – Remarks

Is there a material or actual difference between terms “Foreground” and “Results”?

Is it just a artificial difference made to separate the two programmes, FP7 and H2020 terms from each other – “Foreground” relates to FP7 and “Results” relates to H2020

Does this cause a different legal situation for the creator and/or user?

H2020 General Model Grant Agreement / Article 26.1:

The action’s tangible and intangible outputs, as well as related rights.

- tangible outputs: e.g. prototypes, micro-organisms
- intangible outputs: e.g. know-how, formulas
- related rights: e.g. patent rights and database rights

Results do not include the outputs of activities not described in Annex 1, produced before the action starts or after it ends.

- To avoid or resolve ownership disputes, beneficiaries should keep documents, such as laboratory notebooks, to show how and when they produced the result.



4) “Use” / “Exploitation”

Document Definition / Term	Rules for Participation		Grant Agreement	
	FP7 – No 1906/2006	H2020 – No 1290/2013	FP7 Grant Agreement – Annex II – General Conditions	H2020 General Model Grant Agreement
<p>FP7: Use</p> <p>H2020: Exploitation</p>	No definition.	The use of results in further research activities other than those covered by the action concerned, or in developing, creating and marketing a product or process, or in creating and providing a service, or in standardisation activities.	The direct or indirect utilisation of foreground in further research activities other than those covered by the project, or for developing, creating and marketing a product or process, or for creating and providing a service.	Each beneficiary must, up to four years after the period set out in Article 3 (starting date of the action), take measures aiming to ensure exploitation of its results (either directly or indirectly, in particular through transfer or licensing, by: <ul style="list-style-type: none"> (a) using them in further research activities (outside the action); (b) developing, creating or marketing a product or process; (c) creating and providing a service, or (d) using them in standardisation activities.

“Use” / “Exploitation” – Remarks (1/2)

Is there a material or actual difference between terms “Use” and “Exploitation”?

Is it just a artificial difference made to separate the two programmes, FP7 and H2020 terms from each other – “Use” relates to FP7 and “Exploitation” relates to H2020

Rules for Participation / FP7 / Art. 46:

The participants *shall use* the foreground which they own, or ensure that it is used.

Each participant *shall ensure* that the foreground of which it has ownership is disseminated as swiftly as possible. If it fails to do so the Commission may disseminate that foreground.

Rules for Participation / H2020 / Art. 43:

Each participant that has received Union funding *shall use its best efforts to exploit* the results it owns, or to have them exploited by another legal entity, in particular through the transfer and licensing of results.

“Use” / “Exploitation” – Remarks (2/2)

FP 7 Grant Agreement – Annex II – General Conditions / Art. II.29.:

The beneficiaries shall use the foreground which they own or ensure that it is used.

The beneficiaries shall report on the expected use to be made of foreground in the plan for the use and dissemination of foreground. The information must be sufficiently detailed to permit the Commission to carry out any related audit.

H2020 General Model Grant Agreement /Article 28.1.:

The beneficiaries must take measures aiming to ensure exploitation of their results

- by themselves (e.g. for further research or for commercial or industrial exploitation in its own activities); or
- by others (other beneficiaries or third parties, e.g. through licensing or by transferring the ownership of results)

This is a best effort obligation

- The beneficiaries must be proactive and take specific measures to ensure that their results are used (to the extent possible and justified).

The obligation applies only to beneficiaries receiving EU funding.



5) “Access Rights”

Document Definition / Term	Rules for Participation		Grant Agreement	
	FP7 – No 1906/2006	H2020 – No 1290/2013	FP7 Grant Agreement – Annex II – General Conditions	H2020 General Model Grant Agreement
FP7: Access Rights H2020: Access Rights	No definition.	Rights to use results or background under the terms and conditions laid down in accordance with this Regulation.	Licences and user rights to foreground or background.	Rights to use results or background under the terms and conditions laid down in this Agreement.



Thank you for your attention!