TN1302: BESTPRAC

"Alone at the grant office" - Survival Kit – LEGAL - PART 3

PRACTICAL COMMENTS FOR DESCA MODEL CONSORTIUM AGREEMENT for HORIZON 2020

(Version 1.3.1, March 2016)

BASED ON
"COMMENTS FOR
DESCA MODEL CONSORTIUM AGREEMENT FOR FP7"
shared by **Universidad Carlos III de Madrid, ES**

Document updated, elaborated and adjusted to Horizon 2020
by WORKING GROUP LEGAL (WG3)
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Disclaimer: These practical comments for DESCA model consortium agreement for Horizon 2020 are aimed at assisting participants in H2020 EU-funded projects, in particular TN 1302: BESTPRAC participants, to identify important issues concerning the consortium that may arise before the start of the Action (project) when the CA is being negotiated, during the Action and/or after its end. This document is provided for information purposes only and its content is not intended to replace consultation of any applicable legal sources or the necessary advice of a legal expert, when appropriate. Neither the co-author(s) of these practical comments or any BESTPRAC WG Legal member contributing to the preparation of this deliverable[1] by sharing their knowledge, experience or best practices while discussing CA issues during WG3 meetings or ex-post can be held responsible for the use made of this document.

[1] Primarily based on the outcome of analysis of the DESCA model consortium agreement for Horizon 2020 by the BESTPRAC WG3 members before and during the WG3 meeting in Bratislava, Slovakia, September 16, 2014, incorporated into the document called: "Comments for DESCA model consortium agreement for FP7" provided by Universidad Carlos III de Madrid which has been updated, adjusted and elaborated accordingly.

Introduction:

Before providing some practical comments to the DESCA[2] let us **start with answers to some basic FAQs** first as an introduction to the concept of a consortium agreement itself and the selected issues connected with it.
This mini-guide targets early-stage administrators (**ESAs**). In particular those without legal background and/or with limited access to the legal support services in their own institutions and, therefore, **alone at the grant office** facing negotiations of the consortium agreements. Often ESAs only begin their adventure with the world of the EU Framework Programmes equally fascinating and complex with their variety of implementation measures, the scope of research topics, rules for participation, specific terminology and definitions they must get acquainted with to be able to contribute to the successful implementation of the single projects by their institutions. In this case those won under Horizon 2020 (H2020) calls.
It is very important of the CA that some clauses in the CA **must be negotiated in close cooperation with the researchers** participating in the project if the negotiations in question shall be successful and beneficial both to the institutions and the researchers involved.

1) **Who** concludes the CA?

The Consortium Agreement (CA), unlike the Grant Agreement (GA), regulates the relations only between the consortium members (beneficiaries/project partners/participating legal entities) and, when appropriate, their affiliates. The European Commission or its executive agencies (like, e.g., ERCEA) are not parties to the CA.

2) **When** the CA must be prepared?

The CA must be prepared before the GA is signed by the European Commission or the executive agency and the project[3] coordinator.

3) **Is it always necessary** for the consortium to conclude the CA and what for?

The project coordinator must only notify the Commission or its respective agencies that the CA has been concluded, whenever conclusion of the CA is required by the Work Programmes/Calls for proposals. It means that the CA must not always be concluded.

However, even if not required by the call, it's advised that in the consortium members sign the CA, ideally before the project starts, to define their roles in the consortium, rights and duties towards one another and **to avoid future doubts and/or disagreements** in respects of, *inter alia*, the consortium governance, transfer/re-allocation of funds, access rights to *Background* and *Results* including joint ownership and exploitation rules), confidentiality, liability or dispute resolutions. To this end each consortium, as a rule, is free to draft its own agreement as they see fit, however they must be in line with the provisions if the GA.

4) **What is the relation of the CA provisions**, e.g. concerning confidentiality, to those in the Letter of Intent (LoI) or Non-Disclosure Agreement (NDA)?

[2] DESCA - Development of a Simplified Consortium Agreement.
[3] According to the H2020 Pules of Participation "project" is called "Action" but the authors of this guide use the name "project" just like the authors of the elucidation notes in the DESCA in order to make them coherent.

The LoIs and NDAs are being concluded at the pre-proposal stage and their provisions are being replaced by those in the CA (being prepared along with the GA and (if obligatory) concluded before the signature of the GA) from the effective date indicated in the CA. To this end it is advisable to state in the NDA that its confidentiality obligations will be replaced by those included in the CA, it will allow to avoid conflicting obligations. In case the proposal is not accepted for funding (and, therefore, no CA will be concluded), the provisions of the NDA will survive.

5) **Are there any limitations** concerning the CA provisions to be agreed by the consortium partners?

Since the CA is intended to supplement the GA regulations, one important rule to remember at this point is not to introduce provisions contrary to those in the Grant Agreement as they will not be legally binding.

6) **How** can consortium help itself to prepare a CA for Research and Innovation Actions under H2020?

Our advice will be to use one of the model CAs offered by different group of institutions depending on the sector they are active in.
As far as the EU Framework Programmes are concerned we do recommend, especially to the higher education establishments and the research institutions, the model CA called "DESCA" - most frequently used by the aforementioned institutions.

7) **What is DESCA?**

> ***"DESCA (Development of a Simplified Consortium Agreement)*** *is a simple and comprehensive model Consortium Agreement, stripped of all unnecessary complexity in both content and language. The modular structure of DESCA, with various options and alternative modules and clauses, provides maximum flexibility. Great care has gone into making sure that these variants remain consistent with the core text".*[4]

Important: If you need a to conclude a CA under Marie Sklodowska-Curie Actions (MSCA) please check the model MSCA ITN LERU5 CA6 based on the DESCA model. Please check first if signing of a CA is required by the specific call as it is not a rule under MSCA calls.

8) **What is so good about DESCA** especially for the less experienced EU research grant managers/administrators without legal background and/or with limited access to the legal support services in their own institutions?

"Elucidation notes with concrete examples and detailed explanations about the various options and clauses are provided throughout the model. These notes will help research managers without legal training and first-time Horizon 2020 participants make informed choices about the best wording to protect their interests".[7]

9) **When** the consortium can effectively change the provisions of the GA?

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[4] The DESCA Model Consortium Agreement was specifically designed for Horizon 2020 "Research and Innovation Actions" and "Innovation Actions"". "The DESCA Core Group is represented by ANRT, EARTO, KoWi, LERU, VTT and coordinated by Fraunhofer and the Helmholtz Association", DESCA website: http://www.desca-2020.eu/about-desca/what-is-desca/ (as of March 5, 2015).

[5] The League of European Research Universities.

[6] The LERU website: http://www.leru.org/index.php/public/news/good-agreements-make-good-friends-a-leru-model-contract-for-european-training-networks/

[7] DESCA website: http://www.desca-2020.eu/about-desca/what-is-desca/ (as of March 5, 2015).

Whenever the GA allows you to do so. How would you know? Look for provisions in the GA which include the following: "unless agreed otherwise", e.g.: Art. 25.4 Access rights for affiliated entities: "Unless otherwise agreed in the consortium agreement, access to background must also be given — under fair and reasonable conditions (...)".

10) **What are the survival provisions?**

The survival provisions in the CA are those which remain in full force and effect even after the expiration or termination of the CA, e.g. provisions concerning confidentiality, publication or access rights. Therefore, it is important to learn by which provisions of the CA and for how long our institution is bound as a consortium member even if it left the consortium before the expiration of the CA or its termination by EC or executive agency.

Consortium Agreement DESCA Model (for H2020 RIA and IA)

CONSORTIUM AGREEMENT	***PRACTICAL COMMENTS***
WHEREAS: The Parties, having considerable experience in the field concerned, have submitted a proposal for the Project to the Funding Authority as part of the Horizon 2020 – the Framework Programme for Research and Innovation (2014-2020) ***under the call [insert call identifier].*** The Parties wish to specify or supplement binding commitments among themselves in addition to the provisions of the specific Grant Agreement to be signed by the Parties and the EC (hereinafter "Grant Agreement"). The Parties are aware that this Consortium Agreement is based upon the DESCA model consortium agreement.	*It is a good practice to specify the call for which the proposal has been submitted to make a quick and easy reference to the particular conditions included in the call such as those concerning the obligation of signing the CA (or its lack) or specifying the type of Action (project) financed under the call in question giving an extra hint whether this DESCA model can be used as is or it has to be modified and adjusted for the H2020 Actions other than Research and Innovation Actions" and "Innovation Actions" it was originally designed for.*
SECTION 5: LIABILITIES TOWARDS EACH OTHER	
5.2 Limitations of contractual liability No Party shall be responsible to any other Party for any indirect or consequential loss or similar damage such as, but not limited to, loss of profit, loss of revenue or loss of contracts, provided such damage was not caused by a wilful act or by a breach of confidentiality. A Party's aggregate liability towards the other Parties collectively shall be limited to	*FINANCIAL LIABILITY CAP* *Quite often 'breach of confidentiality' is removed from the scope of this clause since the project partners do not wish to risk an uncapped liability in case of such breach. Alternatively, a separate cap for breach of confidentiality can be suggested (e.g. twice the party's share or a fixed amount) rather than an unlimited liability for breach of*

Insert: once or twice the Party's share of the total costs of the Project as identified in Annex 2 of the Grant Agreement provided such damage was not caused by a wilful act or gross negligence. The terms of this Consortium Agreement shall not be construed to amend or limit any Party's statutory liability.	*confidentiality.* *Remember to limit your institution's aggregate liability towards the other project partners with relation to your institution's share of the total costs, i.e. your project budget. This is always an essential point for, in particular, the public research institutions which usually opt for "once the Party's share". It is rather rare to choose other options (always subject to discussion among the project partners and requires a sound justification by the partner which suggests choosing other options).* *Also ask your management about the scope of different kind of risks covered by the institutional insurance first.*
SECTION 6: GOVERNANCE STRUCTURE [MODULE GOV LP]	
Governance structure for Medium and Large Projects	*DESCA model suggests an optional structure for small projects which only have "General Assembly". For these projects it is better this simpler structure with only one decision making body. Important points to consider:* - *Check if the consortium structure in the CA reflects the one described in the DoA (e.g., General A, Executive Board…) as they must be in line. If essential modifications of the governance structure (e.g. adding or removing one of the consortium bodies or giving them more competences than foreseen in the proposal) are intended in the CA they would require introducing changes in the DoA (Annex 1) first. Otherwise they will become null and void as CA provisions cannot be contrary to the GA or its Annexes;* - *Check whether "veto rights" are assured;* - *Check whether your institution/scientist are represented in the decision-making and management bodies;* - *Make sure that the scientist is well informed at this stage about the*

	planned frequency of the consortium meetings, notifications, deadlines way of taking decisions, quorum and voting rules, the committees' chairs etc. and accepts them;
Option 6.5 Management Support Team	*Please delete this structure if it is not included in the DoA. If it is included, adapt CA accordingly.*
Option 6.6 External Expert Advisory Board (EEAB).	*Like in the Section 6.5 above;* *Additionally, make sure that the confidentiality rules will apply to EEAB's members like they do to the consortium partners. To ease the procedure the coordinator can be mandated to execute NDAs with the members of the EEAB on behalf of the consortium).*
SECTION 7: FINANCIAL PROVISIONS	
7.1.3 Funding Principles: A Party that spends more than its allocated share of the budget as set out in the Consortium Plan will be funded only in respect of duly justified eligible costs up to an amount not exceeding that share.	*Alternative clause may be considered: A Party that spends more than its allocated share of the budget as set out in the Consortium Plan will be funded in respect of its duly justified eligible costs based on a decision of the General Assembly (or other decision-making body) and the availability of funds in the budget.*
7.3 PAYMENTS	
7.3.2 The payment schedule, which contains the transfer of pre-financing and interim payments to Parties, will be handled according to the following	*It's a good practice to make sure the scientist and the management realize that pre-financing is limited to 90% of each beneficiary's maximum EU contribution + 5% is retained for the guarantee fund. In total 15% of our budget will be retained until the approval of the final report, therefore, securing in advance the institutional pre-financing for the 15% of the budget in question is necessary.*
<u>OPTION 1:</u> - Funding of costs included in the	*This option may sometimes be more appealing to the Coordinator, especially in*

Consortium Plan will be paid to Parties after receipt from the Funding Authority in separate instalments as agreed below: - Xx % - on receipt of Advance Payment - .. - … - Funding for costs accepted by the Funding Authority will be paid to the Party concerned.	*case of no experience/a bad experience concerning previous cooperation with some consortium partners. This option allows better control over payments and correlate them with the intermediary outputs generated by the partners.*
OPTION 2: Funding of costs included in the Consortium Plan will be paid to Parties after receipt from the Funding Authority without undue delay and in conformity with the provisions of the Grant Agreement. Costs accepted by the Funding Authority will be paid to the Party concerned.	*This option is usually preferred by the consortium partners other than the Coordinator as the full amount foreseen in the Consortium Plan transferred to the Coordinator is being distributed among the partners without undue delay making their spending schedule more flexible over each reporting period.* ***However,*** *since "undue delay" is not defined, in order to avoid waiting for a long time for the funds , a good practice is to add in this clause after "undue delay" the following sentence: "but in any case not later than 30 days from receiving by the Co-ordinator of the funds from the Funding Authority".*
SECTION 8: RESULTS	
OPTION 1: [Option 1:] Unless otherwise agreed: - each of the joint owners shall be entitled to use their jointly owned Results for non-commercial research activities on a royalty-free basis, and without requiring the prior consent of the other joint owner(s), and - each of the joint owners shall be entitled to otherwise Exploit the jointly owned Results and to grant non-exclusive licenses to third parties (without any right to sub-license), if the other joint owners are given: (a) at least 45 calendar days advance notice; and (b) Fair and Reasonable compensation.	*Before selecting any of those options we shall talk to the scientist asking to provide information concerning the planned research results, i.e. whether there may be generated patentable or in any other way protectable results and who is going to exploit them (our institution directly or an external body).* *In case of expected protectable results, at the same time financial section and Technology Transfer Office should be consulted in terms of the assessment of the potential cost of protection of the Intellectual Property Rights and the possible*

OPTION 2: In case of joint ownership, each of the joint owners shall be entitled to Exploit the joint Results as it sees fit, and to grant non-exclusive licences, without obtaining any consent from, paying compensation to, or otherwise accounting to any other joint owner, unless otherwise agreed between the joint owners. The joint owners shall agree on all protection measures and the division of related cost in advance.	*repartition of those costs between the joint owners.* *Public research institutions often opt for ensuring economic revenues at least under fair and reasonable conditions.*
8.4.2 Dissemination of own Results	*Time limits for the objection procedures suggested in DESCA should be consulted with the researcher in order to find out if they are appropriate according to his her experience or the usual practice in his/her scientific discipline, and if not the default time limits should be modified accordingly.*
8.4.3 Dissemination of another Party's unpublished Results or Background A Party shall not include in any dissemination activity another Party's Results or Background without obtaining the owning Party's prior written approval, unless they are already published.	*At this point it is advisable to talk to the researcher asking to read this section in detail in order not to risk dissemination of another consortium partner's results without prior written approval due to the potential infringement of IPR and its financial consequences. What is more the infringer may be declared a "Defaulting Party" resulting in leaving the consortium and being "blacklisted" for the purposes of participation in the collaborative projects in the future .*
SECTION 9: ACCESS RIGHTS	
9.1 Background *INCLUDED*	*Background included to be made available to the project partners (subject to legal restrictions or limits where applicable) must be listed in Attachment 1 under option 1. To this end the principal researcher must be contacted to help preparing description/list of background included(*), or decide whether no background will be included*

	choosing option 2. Selection of the option would depend on the fact whether background has been identified and/or already declared in the proposal (becoming a binding part of the GA in form of Annex 1 thereto). At the same time the researcher needs to make sure (studying background listed in Attachment 1) that the project partners have listed all background needed in order to perform the own work under the project or exploit own Results generated under the project. *(*) Important: Researchers tend to list all expertise available in their labs or all their publications about the research topic. However, it should be explained to researchers that any knowledge which has already been made public does not qualify as background.*
9.3 Access Rights for implementation	*If the project partners bring Background to the project of the same level/value/significance to the project access for implementation of the project tasks shall be royalty-free. Otherwise the project partners may set up different conditions if so agreed before signing the GA.*
9.4 Access Rights for EXPLOITATION	*It is vital to consult the researcher in respect of the foreseen Results (whether protectable or not) and their potential exploitation within and outside of our institution. Having that knowledge two options need to be considered:*
OPTION 1: 9.4.1 Access Rights to Results if Needed for Exploitation of a Party's own Results shall be granted on Fair and Reasonable conditions. Access rights to Results **for internal**	*This may be the best option knowing that our researchers are going to generate exploitable results Needed by other project partners for exploitation their own Results. It will give our institution the opportunity to obtain economic revenues under fair and*

research activities shall be granted on a royalty-free basis.	*reasonable conditions. However, if our institution is going to need the other partners Results to implement own Results and there will be no such Need on the side of the other partners it may not be the best option to choose.* *The difficulty here is that about five years in advance we are not able to foresee precisely, even having feedback from the researcher, what kind of Results are going to be generated or if any partner will need them for Exploitation its own Results and vice versa.*
OPTION 2: 9.4.1 Access Rights to Results if Needed for Exploitation of a Party's own Results shall be granted on a royalty-free basis.	*This may be the best option for the public research institutions if they do not foresee any exploitable Results in the project* ***and/or*** *if the consortium consists of the same kind of institutions (non-profit, not-for-profit) otherwise usually only the commercial project partners exploit the Results leaving the non-profit institutions without fair and reasonable compensation.*
9.4.3 A request for Access Rights may be made up to twelve months after the end of the Project or, in the case of Art. 9.7.2.1.2, after the termination of the requesting Party's participation in the Project.	*Different period of time may be considered by the consortium especially on request of the commercial partners which may ask for extension of this period up to 36 months which may seem quite a long time (unless a fair and reasonable compensation is assured). In such a case 24 months is usually considered to be an acceptable compromise.*
9.5 Access Rights for Affiliated Entities (if foreseen) Affiliated Entities have Access Rights under the conditions of the GA Articles 25.4 and 31.4. [Optional: , if they are identified in [Attachment 4 (Identified Affiliated Entities) to this Consortium Agreement].	*Public research institutions usually don't have any Affiliated Entities (AE) (unlike the commercial partners) and this Section allows AE to obtain access rights on the same or similar conditions (subject to the specific agreements) as the project partners, if different conditions have not been agreed under the CA, therefore it may*

	be a good idea to request the EA to be listed to limit the number of legal entities requesting Access Rights. Consequently it is rather not advisable to accept a clause, usually proposed by the commercial partners, stating that Access Rights for their AE Affiliates are "deemed granted".
SECTION 11: MISCELLANEOUS	
11.1 Attachments, inconsistencies and severability: This Consortium Agreement consists of this core text and Attachment 1 (Background included) Attachment 2 (Accession document) Attachment 3 (List of Third Parties for simplified transfer according to Section 8.2.2) Attachment 4 (Identified Affiliated Entities) In case the terms of this Consortium Agreement are in conflict with the terms of the Grant Agreement, the terms of the latter shall prevail. In case of conflicts between the attachments and the core text of this Consortium Agreement, the latter shall prevail.	*Please delete attachments not applicable to this CA or include new ones if necessary. Keep the final sentence "In case of conflicts between the attachments and the core text of this Consortium Agreement, the latter shall prevail".*
11.7 Applicable law This Consortium Agreement shall be construed in accordance with and governed by the laws of Belgium excluding its conflict of law provisions.	*It is advisable to keep Belgian law as a default option for the following reasons:* - *This CA has been drafted based on Belgian law,* - *Belgian Law is also considered to be a more "neutral" option that, e.g. the national law of the coordinator's country institution, and* - *It brings in line the provisions of the CA with the GA (assuming the GA is governed by the Belgian law too).*
11.8 Settlement of disputes	In case an amicable solution cannot be reached within the consortium, the following dispute resolution is recommended by DESCA: 1) Mediation, (if not successful) 2) Binding arbitration OR Courts

	We have asked several WG3 members what are the most frequently chosen options by their institutions and why while negotiating this clause. *The replies were so different that it has been really impossible to support more one solution than the other.* *It has been confirmed, however, that the decisive factors taken into consideration by the institutions are: time, money, "security".* *For some WG3 members representing public research institutions mediation (and if not successful) followed by the settlement by the courts were more appealing because of the lower costs than the arbitration and more "secure" in terms of the decisions made and the appealing procedure.* *In case arbitration was chosen by the project partners instead of the court we have supporters of both WIPO and CEPINA (for similar reasons) so it's hard to advise which option shall be more convenient and must be decided on the case by case basis.*