

DG INFORMATION SOCIETY AND MEDIA
ICT Policy Support Programme
Competitiveness and Innovation Framework Programme



**Checklist for a Consortium Agreement
for ICT PSP projects**

Version 1.0 (28-02-2008)

This document can be downloaded via

http://ec.europa.eu/information_society/activities/ict_psp/calls/grant_agreement/index_en.htm

Disclaimer

This checklist is aimed at assisting beneficiaries in projects funded under the ICT Policy Support Programme to identify issues that may arise during the project and which may be facilitated or governed by means of a Consortium Agreement. It is provided for information purposes only and its contents are not intended to replace consultation of any applicable legal sources or the necessary advice of a legal expert, where appropriate. Neither the Commission nor any person acting on its behalf can be held responsible for the use made of this checklist.

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INTRODUCTION

This document provides non-binding guidance to beneficiaries in projects funded by the ICT Policy Support Programme (ICT PSP), as established under the Competitiveness and Framework Programme (CIP)¹, regarding the issues they may wish to address in their Consortium Agreement (CA). The CA is an agreement made between beneficiaries in an ICT PSP project to govern a number of issues that will or may arise during the project.

A CA is required for all **Pilot Type A projects** financed under the ICT PSP. A CA is also a very useful tool for the internal organisation of consortia carrying out other types of projects under the ICT PSP, and in particular for Pilot Type B projects.

The Community is not a party to any CA and does not establish the terms and conditions of the CA. However, the Commission provides these non-binding guidelines in the form of a checklist to highlight some of the main issues and the way they could be addressed by beneficiaries in their CA. It is clear that in a given project not all of the issues highlighted will have to be addressed and that there may be others which are not mentioned in these guidelines which may be relevant.

The provisions of a CA must not affect the beneficiaries' obligations to the Community and/or to each other arising from the grant agreement². Therefore, the CA can contain contractual provisions complementing these where required but must not contradict or negate those obligations.

The CA should in principle be negotiated and signed before starting the project. For Pilots Type A, the grant agreement foresees that the participants are deemed to have concluded a consortium agreement regarding the internal organisation of the consortium. It is clear that where the CA is signed after the grant agreement is signed, beneficiaries may find that any prolonged disagreement about its content may jeopardise the project.

1. PARTIES TO THE CA

- identifies each party to the CA (i.e. beneficiaries to the grant agreement).

¹ Decision No 1639/2006/EC of the European Parliament and of the Council of 24 October 2006 establishing a Competitiveness and Innovation Framework Programme (2007-2013), OJ L 310, 9.11.2006, p. 15.

² For the model grant agreement, please refer to http://ec.europa.eu/information_society/activities/ict_psp/calls/grant_agreement/index_en.htm

2. PREAMBLE

- summarises the context and the purpose of the CA (including the title and acronym of the project as well as the grant agreement number).

3. DEFINITIONS

- defines the important terms used throughout the CA (for the sake of clarity, it is advisable that those terms already defined in the grant agreement are not repeated in the CA but that a reference is made to the terms used in that document).

4. SUBJECT

- describes the subject of the CA with reference to the grant agreement where necessary.

There are different possibilities: either a) to make a mere reference to the Annex I to the grant agreement (Description of work and indicative breakdown of the budget and the Community financial contribution between beneficiaries) or b) to append this Annex I as reference.

5. TECHNICAL PROVISIONS

(This section can be used to complement the provisions of Annex I and to add further details necessary.)

5.1. Tasks of each party

- gives a definition of the tasks that each party intends to carry out as precisely as possible (possibly referring to appended technical documents) and
- outlines the relationship between the tasks of the parties to the CA and any inter-dependence.

5.2. Non-financial resources made available

- gives a detailed overview of the non-financial resources by the parties to the CA, such as:

- human resources (number of persons, key players or exhaustive list if possible, qualifications, etc);
- equipment and facilities (number, nature, place, etc);
- information, such as plans, manuals, calculations, prototypes and also intellectual property rights pertaining to such information.

5.3. Project schedule

- sets out the production schedule for inter-related tasks and for planning purposes (i.e. when, where and how the resources will be made available).

It is recommended that in their own interests the parties should not establish irrevocable schedules unless they are absolutely sure that these can be met, and to include instead contingency plans for delays or missed deadlines. An irrevocably accepted production schedule could be considered to be a guaranteed commitment and may involve payment of indemnities if not met.

On the other hand minimum compliance with deadlines can be guaranteed by other methods, as discussed in the section on Managerial Provisions.

5.4. Changes

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

The CA may have to be adjusted 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, the inclusion of new partners, etc. To avoid disputes, the conditions and procedure should be clearly indicated (see also Managerial Provisions and General Provisions).

However, as explained above, the provisions in the CA must not contradict or negate the obligations of the beneficiaries set out in the grant agreement. In particular, it should be noted that any changes which have an impact on the grant agreement should be agreed with the Commission, and the procedures for amendments set out in the grant agreement has to be followed for any modification to the grant agreement.

6. MANAGERIAL PROVISIONS

- describes the provisions dealing with the management of the project (e.g. management bodies, tasks and decision making process), unless already covered by Annex I to the grant agreement. In the latter case, this section can be used to complement the provisions in Annex I and to add further details necessary.

6.1. Coordination and management

- establishes a coordination structure (may be called steering committee, liaison committee, management committee, and can be broken down into different sub-groups such as financial, technical, legal, etc) with among others the following tasks:

- to coordinate, define, divide and develop the tasks;
- to check the progress of the work;
- to coordinate the preparation of the reports (technical, financial, etc.);
- to permit formal exchanges of information between the partners.

The work of this steering committee is frequently translated into daily management and representation duties by a coordinator (or manager) selected from among the parties. Other committees can be created as necessary and should report to the steering or coordination committee. Provision should be made for the creation of ad hoc committees as and when necessary.

- joint committees can be established to deal with issues such as:

- composition;
- role (steering, management, technical, financial, IPR, etc);
- organisational procedures (e.g. schedule and calling of exceptional meetings);
- conflict resolution (including cases of abuse of power within the project).

In case of Pilots Type A, the CA could also provide for or complement the respective provisions in Annex I to the grant agreement concerning steering and/or monitoring groups involving other participants in addition to the beneficiaries, such as other States, industry or relevant stakeholders, in view of developing consensus and harmonising and agreeing on common specifications.

6.2. Powers and responsibilities

- the CA should carefully define with regard to any body which is established or any person who is entrusted with certain tasks:

- the powers and responsibilities thereof;
- the operating procedures (preparation of agenda, meetings, decisions, chairmanship, minutes, votes, etc.);
- in the case of bodies, their organisation - composition, powers of each party, decision making method, possible depending on the nature of the issue (unanimously, majority agreement, voting and veto rights etc.);

- to avoid too cumbersome procedures to make minor changes, the parties could foresee a different approval process depending on the nature of the change envisaged (e.g. minor vs. significant with a description thereof).

6.3. Follow-up and Supervision

- describes how the follow-up and supervision of the project will take place.

Each party undertakes to follow the production schedule and budget specified in the technical provisions of the grant agreement. 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 (possibly via input from scientific or technical committees) managed by the steering committee, including:

- frequent progress meetings (ranging from once a month to once per quarter);
- frequent technical and financial progress reports (actions completed and results obtained);
- optional extraordinary meetings as soon as agreed estimated deadlines have been overrun, including the right for the parties to review their position within the cooperative venture based on clearly stated reasons.

7. FINANCIAL PROVISIONS

(This section can be used to complement the provisions of the grant agreement and its annexes and to add further details necessary).

7.1. Financial plan

- describes in more detail than the grant agreement the financial plan, including:

- a detailed estimate of the total cost per party and overall total;
- the expected Community financial contribution to each party and distribution thereof;
- each party's own contribution;

- outside third party (financial) resources (from authorities, banks, venture capital, etc. and clarification of whether to be considered receipts of the project);
- an expenses and financing plan;
- annual budgeting.

If necessary more detailed financial issues can be included in annexes to the CA.

7.2. Changes

- sets out provisions for dealing with changes to the financial aspects of the project.

The data in the financing plan provides an estimate of expected costs and Community financial contributions and may undergo changes. The CA should clearly specify the conditions governing financial modifications (especially those regarding budget transfers between beneficiaries) and their consequences on the organisation of the cooperation (see Managerial Provisions).

8. PROVISIONS REGARDING INTELLECTUAL PROPERTY RIGHTS (IPR), DISSEMINATION AND USE AND ACCESSIBILITY OF RESULTS

- describes additional provisions on IPR, use and dissemination to those in the grant agreement, taking into account the special requirements for Pilots Type A concerning the publication and free accessibility of results.

The basic principle applied in drafting these provisions is to provide a flexible and efficient mechanism to support the cooperation between the parties, to encourage protection and maximum use of foreground³ as well as to ensure swift dissemination thereof. However, for Pilots Type A, the specific requirements concerning publication and free accessibility of results needed for cross-border interoperability, which partly derogate from the general provisions on IPR in the grant agreement, have to be respected.

³ It is clear that any provisions regarding IPR (in particular those concerning joint ownership, use and access rights) must respect any applicable competition law rules.

8.1. Special requirements for Pilots Type A

The grant agreement provides (by means of a special condition used for all Pilots Type A) that deliverables described in Annex I and foreground needed for cross-border interoperability (in particular common specifications and common building blocks for interoperability established under the project), are publicly available, accessible and usable free of charge. Specific requirements set out in this respect in Annex I, such as the obligation to publish building blocks under an EU Public License or compatible licenses, have to be complied with.

Details on how this special provision for Pilots A will be implemented in the project will be set out in Annex I (Description of work) to the grant agreement. The CA may complement these provisions in the grant agreement and in particular Annex I.

8.2. Ownership of foreground

- deals with the ownership of foreground developed in the project.

According to the grant agreement, foreground is owned by the party carrying out the work generating the foreground unless the work in question was carried out jointly and the respective share cannot be ascertained, in which case there will be joint ownership.

In case of joint ownership, the joint owners must establish an agreement regarding the allocation and terms of exercise of that joint ownership. Such an agreement may involve issues such as how to govern the difficulties in continuing with joint ownership depending on the circumstances or foresee an alternative regime to joint ownership (for example, a single owner with access rights for the other beneficiaries that transferred their ownership share). If joint ownership is maintained, it could for example be agreed:

- to have some form of division of application markets, by virtue of which one party to the invention owns the discovery only in business sectors in which it is already active;
- to set up a regime for the protection (e.g. when and how to protect and who bears the costs for protection and possible enforcement);
- to set up a regime for use (including licensing) by the joint owners, within for example specified limits and possible profit sharing.

Joint ownership issues can be regulated once and for all in the CA, or in separate joint ownership agreements developed for each joint ownership situation (as a one-size-fits-all approach may not be appropriate in all projects).

For deliverables and foreground needed for cross-border interoperability, the special requirements for Pilots Type A have to be taken into account (see above section 8.1).

8.3. Protection of foreground

- governs issues regarding the protection of foreground, e.g. the procedure to be followed to take into account the legitimate interests of other participants.

For deliverables and foreground needed for cross-border interoperability, the special requirements for Pilots Type A have to be taken into account (see above section 8.1).

8.4. Use and dissemination of foreground

Use

- sets out provisions in respect of the obligation to use the foreground commercially or otherwise.

Dissemination

As stated in the grant agreement, each owner must ensure that its foreground is disseminated as swiftly as possible and must give notice to the other participants concerned. The CA may contain provisions to ensure coherent dissemination for example through co-authoring of publications. It may also determine a specific notice period instead of the default notice period foreseen in the grant agreement (notification to be given 45 days prior to the dissemination activity) or another deadline for the objection of beneficiaries against the dissemination activity (the default time-limit in the grant agreement for objection is within 30 days of notification). The CA could also govern the notification/objection process (e.g. how notices/objections are given and how disagreements are being dealt with, etc). Finally, the grant agreement states that beneficiaries may waive their right to prior notice for specific or all dissemination activities. Such a waiver could also be foreseen in the CA.

For deliverables and foreground needed for cross-border interoperability, the special requirements for Pilots Type A have to be taken into account (see above section 8.1).

8.5. Access rights (licences and user rights)

- complements where necessary the access rights regime foreseen in the grant agreement (most of these issues may also be determined in separate agreements particularly if they concern only some of the parties to the CA).

The CA may, inter alia:

- determine the procedure regarding requests for access rights;
- set out whether access rights confer the entitlement to grant sub-licences;
- provide for more favourable access rights than those foreseen in the grant agreement, for example concerning entities entitled to request access rights (e.g. affiliates), and set out

further arrangements for access rights by such entities, including regarding any notification requirements.

- provide for access rights to background (information and rights held by a beneficiary prior to its accession to the grant agreement) or sideground (information and rights acquired in parallel to the grant agreement);
- define the conditions for access rights (according to the grant agreement, access rights to foreground are granted on a royalty-free bases, unless the beneficiaries agree otherwise);
- determine, regarding access rights to foreground for use, whether a request for access rights must be made within a different time-limit to the one year time-limit foreseen in the grant agreement.

For deliverables and foreground needed for cross-border interoperability, the special requirements for Pilots Type A have to be taken into account (see above section 8.1).

9. GENERAL PROVISIONS

9.1. Entry into force of the CA

- determines the effective date of entry into force of the CA.

9.2. Duration / Termination of the CA

- deals with the duration of the CA and with the causes of early termination and addresses issues such as:

- the duration of the CA vs. duration of the grant agreement (e.g. 6 months longer, etc);
- the possibility of tacit renewal and extension;
- the automatic termination after full completion of the project;
- the termination prior to full completion or upon early termination of the grant agreement;
- the termination due to breach;
- the consequences of different reasons of termination (e.g. return of documents).

9.3. 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;
- the revision of important provisions.

Note that any change which has an impact on the grant agreement should be agreed with the Commission, and the procedures for amendments set out in the grant agreement has to be followed for any modification to the grant agreement.

9.4. Confidentiality

- 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 under the heading "Survival" below).

9.5. 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).

9.6. Survival

- sets out which provisions survive the duration of the CA, such as those regarding:

- confidentiality;

- applicable law and jurisdiction;
- access rights provisions;
- use of the project acronym (especially if this acronym is protected as a trademark or a domain name on this acronym has been registered).

9.7. Partial invalidity

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

9.8. Communication

- sets out how notices and other communication under the CA must be made.

The way notices and communications have to be made may differ according to the importance of the communication and the aim pursued (for example, registered letter with acknowledgement of receipt for particularly important notifications, simple letter or e-mail for others).

9.9. 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 or the law which is applicable on a subsidiary basis to the grant agreement in question. However, any national law can be chosen⁴. The CA may also stipulate that the rules 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 disputes⁵ 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).

9.10. 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);

⁴ However, the choice of applicable law and jurisdiction may render conflict resolution more expensive or difficult (for example if extensive translations have to be made or when the jurisdiction chosen means that experts need to be appointed if the jurisdiction is unfamiliar with the applicable law).

⁵ To avoid that conflicts escalate and reach the litigation phase, it is advisable to foresee a managerial procedure to detect and discuss potential problems at an early phase, with an escalation to a different level if the problem cannot be solved at the initial level.

- determines the signature process (separate signature page, counterparts, etc).