Comparison of FP7 consortium agreement models

- Introduction..............................................................................................................................................1
- 1. Management of background................................................................................................................2
- 2. Management of foreground.................................................................................................................2
- 3. Access rights.......................................................................................................................................2
- 4. Affiliated companies............................................................................................................................3
- 5. Confidentiality and publications...........................................................................................................3
- 6. Special clauses specific to software....................................................................................................3

Last updated February 2008

Please note that readers should be aware of the FP7 intellectual property (IP) rules and topics related to consortium agreements in order to fully understand the issues at stake.

Introduction

With the beginning of the Seventh Framework Programme (FP7), various consortium agreement models made their appearance, namely DESCA, IMG4, IPCA and EUCAR. This document presents and compares them. All models are usually updated several times, therefore readers should check the information provided hereafter against updated versions. We will also update this document whenever necessary and cover newly appearing models.

In the following paragraphs, we will look into the clauses related to Intellectual Property (IP). The information below is complemented by a table that highlights the main differences between the models.

DESCA (Development of a Simplified Consortium Agreement) is the fruit of collaboration between several organisations, mainly from the research sector. DESCA is drafted in a relatively simplified and comprehensive way. Users without any legal background may therefore find it easier to use. DESCA proposes alternative options for several key clauses, incorporated in the different illustrative examples available. Generally speaking, the “fair and reasonable” option is closer to the provisions of Annex II to the grant agreement (hereafter “Annex II”) while the “royalty-free” option gives DESCA a more business-oriented approach, as will be shown hereunder. DESCA also proposes two alternatives for the internal organisation of the consortium (consortium bodies and decision making) to fit small and large projects. There is also a special module with detailed provisions on software.

IMG4 is drafted by ASD-IMG4, the Industrial Management Group that represents the biggest aerospace companies in Europe. It is based on the DESCA model and is very similar. However, it does not propose alternative options, and some IP clauses are modified to fit the needs of FP7 Aeronautics projects. Additionally, it includes an agreement to loan of material and equipment developed in the project.

IPCA (Integrated Projects Consortium Agreement) was published by the European Information & Communications Technology Industry Association (EICTA). This model is meant to suit the needs of the industry and contains several clauses supporting the commercial exploitation of the results. It also contains detailed provisions on software, as well as alternatives (option 1 and 2) in several key clauses. EICTA also suggests a model Memorandum of Understanding for the proposal preparation.

EUCAR, the European Council for Automotive R&D, gave its name to its own model. The EUCAR model contains provisions that encourage both the economic exploitation and the dissemination of the project results. It is less detailed than the other models but proposes alternatives for the access rights regime and the management of background, as well as a default internal organisation of the project into subprojects. It is also accompanied by an optional Letter of Intent for the proposal stage.

Broadly speaking, DESCA seems more appropriate for universities and research centres but can also be used in business-oriented projects (likely to choose the “royalty-free” option). IMG4 is
closer to DESCA’s “fair and reasonable” option, with differences meant to facilitate the effective utilisation of the results by the participants. IPCA could be more suitable for projects and partners with a strong focus on commercial exploitation, especially if the latter is also carried out by affiliates. EUCAR is also business-oriented, but facilitates the dissemination of the results, as mentioned.

Mixing clauses from different models is not recommended (nor is mixing options within the same model), as it will probably lead to internal inconsistencies. However, this does not mean participants are required to use the models as they are. On the contrary, it is very important to read and fully understand a model before using it and make modifications, if necessary, to cover specific needs.

1. Management of background
IPCA marks an important difference here, since it defines sideground and provides for access rights to it under the same conditions as background. Sideground is the information and IP rights that participants acquire in parallel to the work of the project and is distinguished from background, which covers only the information that participants hold before entering the project. EUCAR provides a different definition of background information that does not specify that we are dealing with information generated before the project start. Therefore, access rights to sideground are also applicable.

With regard to the definition of background available to the project, DESCA proposes an option that enables participants to delimitate background by designating a specific department or research team to work on the project, a possibility that may prove useful to universities or research organisations. IMG4 simply states that participants shall identify the background available to access rights and, like DESCA, establishes a mechanism for revision of the relevant list whenever necessary. IPCA only describes the background to be excluded (all the rest may be available to access rights). The exception here is EUCAR, which does not seem to exclude any background from the project. However, it provides that the granting of access rights to background is subject to the legitimate interests of the participant granting them.

2. Management of foreground
As compared to DESCA and IMG4, which require participants to waive their objection right for transfers of foreground to third parties specifically identified in an attachment, IPCA facilitates transfers of foreground to a broader scope of transferees, including affiliates. EUCAR includes a list to identify affiliates to which foreground may be transferred without any further notification or any right of objection. However, transfers to other third parties are to be notified in advance and approved.

The Annex II default regime on joint ownership is applicable under one of DESCA’s options, i.e. each joint owner shall inform and compensate the others in order to use and licence the common foreground. IMG4 is somewhat different and states that each joint owner will be free to use the common foreground directly, though prior notification and compensation are required for granting licences to third parties.

IPCA excludes the default regime in all cases and eases individual exploitation, providing for a “perpetual and irrevocable” right, “without territorial or other restriction”, to use and license the common foreground (possibly with the right to sublicense). EUCAR provides that the shares of each joint owner will be equal and undivided; each joint owner is free to license the common foreground, including the right to sublicense.

3. Access rights
A main difference between the models is that in DESCA and IMG4 all access rights requests shall be made in writing, while IPCA considers some access rights to be “deemed granted”, within
the limits of what is necessary for the execution of the project or use of foreground. EUCAR also considers access rights deemed granted, while its definition of what is “needed for use” is very open.

All models provide for royalty-free access rights for execution purposes (although DESCA also offers the opportunity to agree on royalties). Regarding use purposes, IPCA provides for broader access rights (also in combination with the provisions related to affiliates and sideground); moreover, participants are free to use any foreground generated in the project (not only the foreground they have generated). Research centres or universities that are not capable of commercially exploiting the foreground directly or indirectly may find the “fair and reasonable” option of DESCA and IMG4 more appropriate for the protection of their interests. Finally, EUCAR provides an intermediate option in which participants are free to use any foreground generated inside the subproject they participate in and related access rights are royalty-free; however, access rights for use of foreground are granted on preferential terms between participants from different subprojects.

4. Affiliated companies

One of the main differences between the models is the definition of affiliates. DESCA does not define the term so the definition given by article II.1 of Annex II is applicable. IMG4 does not provide a definition either, but contains a specific provision to facilitate the granting of access rights for use to affiliates established in Member or associated States, while enabling participants to veto such access rights in some cases.

IPCA and EUCAR provide a more detailed/different definition that generally results in additional entities qualifying as affiliates.

Similarly, IPCA and EUCAR recognise broader access rights for affiliates under more favourable economic terms, compared to DESCA. The latter provides alternative options, one in line with the Annex II regime and the second providing for some additional access rights.

Furthermore, upon cessation of the affiliate status, DESCA and IMG4 provide for the termination of any access rights granted to it, while IPCA provides for the continuation of some access rights, under certain conditions. DESCA and IMG4 also state that affiliates’ access rights are subject to the continuation of the access rights of the relevant participant, a provision that might prove problematic in some cases.

To summarise, IPCA and EUCAR models enable an easier and more extended granting of access rights to affiliated entities as compared to DESCA and IMG4.

5. Confidentiality and publications

DESCA and IMG4 provide that confidential information shall be marked as such, while IPCA proposes an option where all information exchanged between the participants is considered confidential. Under EUCAR, all information exchanged has to be handled with due care by participants (there is no specific obligation to mark any specific information “confidential”).

Regarding publications, DESCA and IMG4 follow the provisions of Annex II and also require participants to cooperate in the timely submission and publication of academic works. IPCA requires participants to inform the Commission as well of any publication plans. EUCAR differs on this, allowing each participant to disseminate its own foreground without notifying the other parties.

6. Special clauses specific to software

IPCA establishes several conditions on the utilisation of Open Source Software (OSS), which shall be approved unanimously by the partners. The approval is given by written agreement for specific software and purpose. Over and beyond such agreements, partners are required to provide access rights on terms other than the OSS-type licences. DESCA’s conditions are easier
Comparison of FP7 consortium agreement models

to comply with, since it simply requires approval from the general assembly (not necessarily unanimously).

1. There is always more to say, therefore readers are reminded that they may send their draft consortium agreements to our Helpline service for further comments on IP clauses.

2. As a general comment, participants are advised not to modify the definitions provided by the FP7 rules, such as background, foreground, access rights, use, etc. In any case, it is worth repeating that in case of inconsistency between the consortium agreement and the grant agreement, the latter prevails.

3. Please note that Annex II provides the option to waive the right to be notified in advance, not the right to object (cf. Art. II.27.2 in fine).

4. EUCAR defines “needed for use” as “means needed as necessary to enable the Use”; “Use” is defined more broadly than in the grant agreement and refers to background. However, this has no impact on the access rights regime for use purposes, which is limited to foreground, in line with the grant agreement.

5. Partners may wish to carefully consider the issue of entities that are not established in a Member or associated State and which may qualify as affiliates under the consortium agreement.

The IPR-Helpdesk project is coordinated by the University of Alicante, which is supported by the Intellectual Property Law Institute of Jagiellonian University in Cracow and European Research and Project Office GmbH in Saarbrücken.

Project Management Office
IPR-Helpdesk
Edificio Germán Bernácer
Universidad de Alicante
P.O. Box 99
03080 Alicante
España

e-mail: ipr-helpdesk@ua.es
Tel.: +34 965 90 97 18
Fax: +34 965 90 97 15

Representative Office
IPR-Helpdesk
98, Rue du Trône
B-1050 Brussels

e-mail: ipr-helpdesk@ua.es
Tel.: +32 (0) 2 213 41 63
Fax: +32 (0) 2 213 41 69