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Checklist for a Consortium Agreement for Fuel Cells and Hydrogen Joint Undertaking projects

Disclaimer

This checklist is aimed at assisting participants in an FCH JU-funded project to identify issues that may arise during the project and which may be facilitated or governed by means of a Consortium Agreement (CA). The checklist 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 FCH JU nor any person acting on its behalf can be held responsible for the use made of this checklist. The FCH JU is not party to the CA and takes no responsibility whatsoever of the contents of the CA signed between participants.



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1. INTRODUCTION

This document provides non-binding guidance to Fuel Cells and Hydrogen Joint Undertaking (FCH JU) (participants regarding the issues they may wish to address in their Consortium Agreement (hereinafter "CA"). The CA is an agreement made between participants in an indirect action (i.e. a project) receiving financial contribution from the FCH JU to govern a number of issues that will or may arise during the project.

A CA is required for all projects receiving financial contribution from the FCH JU **unless otherwise stipulated in the call for proposals**. The FCH JU is not a party to any CA and does not establish the terms and conditions of the CA. However, the FCH JU has established 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 participants in their CAs. 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 should not affect the participants' obligations to the FCH JU and/or to each other arising from the FCH JU Grant Agreement. Therefore, the CA can contain contractual provisions complementing these where required but they should not contradict or negate those obligations.

A CA may take different legal forms. Although a normal written agreement between the participants is likely to be by far the most common form chosen by the participants, it may for example also take the form of a separate legal entity (for example a European Economic Interest Grouping, association or joint venture). The advantages and disadvantages of each particular legal form should be carefully examined by the participants and determined in accordance with the needs of the consortium.

The CA should in principle be negotiated and signed before starting the project. The FCH JU Grant Agreement foresees that the participants are deemed to have concluded a consortium agreement. It is clear that where the CA is signed after the FCH JU Grant Agreement is signed, participants may find that any prolonged disagreement about its content may jeopardise the project. In addition, it must be noted in this respect that regarding access rights to background for implementation of the project, decisions need to be made before acceding to the FCH JU Grant Agreement, otherwise a default regime will apply.

2. PARTIES

- identifies each party to the CA (i.e. beneficiaries¹ to the FCH JU Grant Agreement).

¹ It may be appropriate in some circumstances to add other interested parties to CA such as third parties providing resources to one of the beneficiaries or carrying out part of the work (if foreseen in the FCH JU Grant

3. PREAMBLE

- summarises the context and the purpose of the CA (including the title and acronym - where applicable - of the project as well as - if already known - the FCH JU Grant Agreement number).

4. DEFINITIONS

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

5. SUBJECT

- describes the subject of the CA with reference to the FCH JU Grant Agreement where necessary.

There are several possibilities: either a) to make a mere reference to the technical annex (Annex I) to the FCH JU Grant Agreement, b) to append this technical annex as reference or c) to repeat the main provisions including:

- the preliminary technical specifications;
- the desired technical results;
- the work to be accomplished;
- the contribution of each party;
- the (maximum) effort expected.

6. TECHNICAL PROVISIONS

(Unless already covered by Annex I of the FCH JU Grant Agreement. In this case this section can be used to add any further details necessary)

Agreement) and/or third parties who are end-users. However, the terms and conditions applicable to these entities should be limited to those aspects which are relevant to their role.

6.1. 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) (as set out in Annex I to the FCH JU Grant Agreement);
- outlines the relationship between the tasks of the parties and any inter-dependence.

6.2. Non-financial resources made available

- gives a detailed overview of the non-financial resources, such as:
 - human resources (number of persons, key players or exhaustive list if possible, qualifications, secondment², etc);
 - equipment and facilities (number, nature, place, etc);
 - background or other information (such as plans, manuals, calculations, prototypes and also intellectual property rights pertaining to such information);
 - contributions of sponsors or any other third party (such as subcontractors or affiliates).

6.3. 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.

6.4. Changes

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

² Many agreements require the parties to second personnel to other organisations, frequently abroad. In this case, it may be useful to stipulate in the CA the main conditions of such secondment, which may entail an independent agreement separate from the main agreement. The following points might be taken up (the work needed to prepare the secondment, accommodation, interpreters, travel allowances, working hours, remuneration, overtime, travel expenses, holidays, medical care and reimbursement of costs, other social security items (life insurance, pension funds, etc.), settlement of accounts and payment, working conditions, IPR regime, employer liability, insurance, applicable law and jurisdiction (e.g. arbitration).

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 (e.g. provisions on promoting the participation of SMEs could be envisaged), etc. To avoid disputes, the conditions and procedure should be clearly indicated (see also Managerial Provisions and General Provisions).

7. MANAGERIAL PROVISIONS

- describes the provisions dealing with the management of the project (e.g. management bodies, tasks and decision making process).

7.1. Co-ordination and management

- establishes a co-ordination 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 define, divide and develop the tasks;
- to check the progress of the work;
- to co-ordinate the research teams;
- to co-ordinate the preparation of the reports (technical, financial, etc.);
- to advise and direct the partners on the developments necessary for the project;
- 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 co-ordinator (or manager) selected from among the parties. Other committees can be created as necessary and should report to the steering or co-ordination 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).

7.2. 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 nature of issue (unanimously, majority agreement, voting and veto rights etc.);

- to avoid too cumbersome procedures to make minor changes (especially those requiring an amendment to the FCH JU contracts), 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).

7.3. 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 FCH JU 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 co-operative venture based on clearly stated reasons.

8. FINANCIAL PROVISIONS

(beyond those already included in the FCH JU Grant Agreement and its annexes)

8.1. Financial plan

- describes in detail the financial plan, including:

- a detailed estimate of the total cost per party and overall total;
- the expected FCH JU 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.

8.2. Mutual payments

- deals with mutual payments and common costs of more than one party.

Under certain circumstances, two or more parties may incur common expenses (personnel, equipment, etc.). It is desirable to provide for the procedure governing the payment of this type of expense by each party in the CA and to clearly identify its reporting to the Commission, particularly as regards the following:

- reimbursable advance to a participant and method of reimbursement;
- joint account and conditions for paying in funds;
- terms of payment;
- currency;
- impact of exchange rates and bank transfer costs;
- payment of taxes;
- interest, if any;

- identifies management activity costs beyond those foreseen by the FCH JU Grant Agreement, etc.

8.3. Costs to be claimed under the management activity

- determines the costs which relate to the management of the project.

Costs for the administrative and financial management of the consortium (e.g. costs related to management meetings, costs related to mandatory certificates on the financial statements, settlement of disputes) will be reimbursed by the FCH JU financial contribution according to the information stated in the call and in the FCH JU Grant Agreement. However, care should be

taken to ensure that only costs identified as potential management costs in the Grant Agreement are included in the consortium management activity.

8.4. 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 FCH JU 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 co-operation (see Managerial Provisions).

9. 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 foreground³ as well as to ensure swift dissemination thereof. More information about these provisions can be found in the FCH JU Grant Agreement.

9.1. Ownership of foreground

- deals with the ownership of foreground developed in the project (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 within either six months or a different time-limit agreed upon⁴. Such an agreement may involve issues such as how to govern the difficulties in continuing with joint ownership depending on the circumstances (an alternative regime may be agreed upon (for example, a single owner with access rights for the other beneficiaries that transferred their ownership share). If joint ownership is maintained, it could be agreed:

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.

⁴ If no agreement is reached within the applicable period, the default provisions in the FCH JU grant agreement will apply.

- to have some form of territorial division, by virtue of which one party to the invention owns the invention only in some countries and the other parties are free to register it in other specified countries;
- 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).

9.2. Transfer of foreground

- deals with the transfer of ownership (e.g. the manner in which notice/objection is to be given, parties may waive their right to individual prior notice regarding transfers to specifically identified third parties in the CA or a separate agreement).

9.3. 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 or in case the owner does not wish to protect, how to deal with possible patent applications⁵ (for example, a confidential review/notification process to ensure that all co-inventors are mentioned and that only the foreground concerned is made public), non-disclosure of information).

9.4. Use of foreground

- sets out provisions in respect of the obligation to use the foreground commercially or in further research (in accordance with the plan for use and dissemination – see under ownership above regarding jointly owned foreground);

- special attention must be given to this aspect in any project in the field of security research, especially when dealing with foreground subject to national, Community or International legal restrictions (e.g. classified information).

⁵ As set out in the EC grant agreement, patent applications regarding foreground must contain a statement that the foreground was generated with financial support from the FCH JU.

9.5. Dissemination (including publication) of foreground

- 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, to determine a specific notice period instead of the default notice period foreseen in the FCH JU Grant Agreement and to govern the notification/objection process (e.g. how notices/objections are given and how disagreements are being dealt with, etc));

- special attention must be given to this aspect in any project in the field of security research, especially when dealing with foreground subject to national, Community or International legal restrictions (e.g. classified information).

9.6. Access rights (licences and user rights)

- complements where necessary the access rights regime foreseen in the FCH JU 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).

In general the CA may:

- determine the procedure regarding the written request for access rights and attach thereto the acceptance of conditions regarding confidentiality and use for the intended purpose;
- set out a procedure regarding the possible waiving of access rights by written confirmation;
- set out whether access rights confer the entitlement to grant sub-licences (in principle access rights are granted without the right to sub-licence);
- provide for more favourable access rights than those foreseen in the FCH JU Grant Agreement, whether concerning scope (e.g. including sideground) or concerning entities entitled to request access rights (e.g. affiliates).

With respect to access rights to foreground foreseen in the FCH JU Grant Agreement, the CA may:

- define the conditions for access rights to foreground needed 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 foreground needed for use of own foreground by affiliates (if no special clause regarding affiliated entities is inserted in the FCH JU Grant Agreement they will have access under the conditions set out in Article II.34(3) of said agreement unless otherwise provided for in the CA – the CA may also provide for more favourable or different access rights for affiliates and set out further arrangements, including regarding any notification requirements);

- 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 FCH JU Grant Agreement.

With respect to access rights to background foreseen in the FCH JU Grant Agreement, the parties may:

- define the background needed for the project in any manner suitable and may agree to exclude specific background (such definition or any exclusion should be sufficiently clear to avoid disputes afterwards);
- define fair and reasonable conditions for access rights to background for implementation (if no agreement is reached by all the participants before their accession to the FCH JU Grant Agreement such access rights shall be royalty-free);
- define the conditions for access rights to background 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 background needed for use of own foreground by affiliates (if no special clause regarding affiliates is inserted in the FCH JU Grant Agreement they will have access under the conditions set out in Article II.34(3) of the said agreement unless otherwise provided for in the CA – the CA may also provide for more favourable or different access rights for affiliates, including regarding any notification requirements);
- determine regarding access rights to background for use whether a request for access rights must be made within a different time-limit than up to one year as foreseen in the FCH JU Grant Agreement.

It is to be noted that, as outlined above, if access rights to background for implementation will not be provided on a royalty-free basis, such a decision must be made before acceding to the FCH JU Grant Agreement.

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 the FCH JU Grant Agreement).

10.2. Duration / Termination

- 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 FCH JU 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 FCH JU Grant Agreement;
- the termination due to breach;
- the 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 FCH JU Grant Agreement is also amended);
- 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. 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).

10.5. Treatment of classified data or information, treatment of dangerous materials

- For security research projects, the parties need to define internal rules on how to handle, use and transfer classified data and information or dangerous materials. Any such treatment has to respect the relevant national, Community and International legal restrictions. The CA can also contain legal consequences for the case of non-performing / non-complying parties, in addition to the relevant contractual clauses of the FCH JU Grant Agreement.

10.6. 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).

10.7. 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).

10.8. Partial invalidity

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

10.9. Communication

- sets out how notices and other communication under the CA must be made (the way this is done may differ according to the aim pursued).

10.10. 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 FCH JU Grant Agreement in question. However, any national law can be chosen⁶. 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 disputes⁷ 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).

10.11. 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).

⁶ 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).

⁷ 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.