EUROPEAN COMMISSION
Directorate-General for Research & Innovation

Guidance

Establishing a consortium agreement

Version 0.1

IMPORTANT NOTICE

Disclaimer

You remain fully responsible for your consortium agreement. This document is necessarily general and may not address your specific needs. Moreover, it cannot replace professional legal advice.

Updates

This text is a draft and will be subject to revision concerning structure and presentation.

Other information

This document is limited to the Consortium Agreement for Horizon 2020 proposals.

Further practical information and assistance, including factsheets and model agreements can be found at the European IPR Helpdesk.

> These **fact sheets and model agreements** may assist the parties during negotiations, and can be used as inspiration, or as a checklist of topics to be discussed, or as a starting point or framework for the actual agreement to be concluded.
>
> However, note that these model agreements have not been endorsed by the Commission and are just samples, not one-size-fits-all agreements. Thorough analysis of an action is needed to see which model agreement is the most suitable, taking into account the particular features of the action. If consortium members decide to use a particular model agreement, they should amend it where necessary to accommodate the consortium's specific needs and to comply with any legal requirements. Legal advice should be sought where appropriate.

For a more general overview of how Horizon 2020 grants work, see the 'Online Manual' on the Participant Portal. For detailed information see the Horizon 2020 Annotated Grant Agreements.

A comprehensive list of the Horizon 2020 reference documents (including legislation, work programme and templates) can be found in the 'Reference documents' section of the Participant Portal.

Horizon 2020 terms are explained in the Glossary of the Participant Portal.

If you need to, you can also contact the Horizon 2020 Helpdesk.

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1. The consortium agreement

1.1 Context of a consortium agreement

Except in duly justified cases provided for in the work programme or call for proposals, the Horizon 2020 Rules for Participation and Dissemination require members of a consortium participating in a multi-beneficiary action to conclude an internal agreement (referred to as a **consortium agreement**) to establish their rights and obligations with respect to the implementation and organisation of the action, in accordance with the Grant Agreement.

Contrary to the Grant Agreement which is a non-negotiable agreement between the European Union (represented by the European Commission) and the beneficiaries framing the specific action and the funding, the consortium agreement is a private agreement between the beneficiaries and does not involve the European Commission.

While the Grant Agreement specifies rights and obligations relating to the action, the consortium agreement deals with the rights and obligations of the beneficiaries amongst themselves. The consortium agreement should — in principle — be concluded before the Grant Agreement. More details on the consortium agreement can be found in section 3.

1.2 Timeline of an action under Horizon 2020

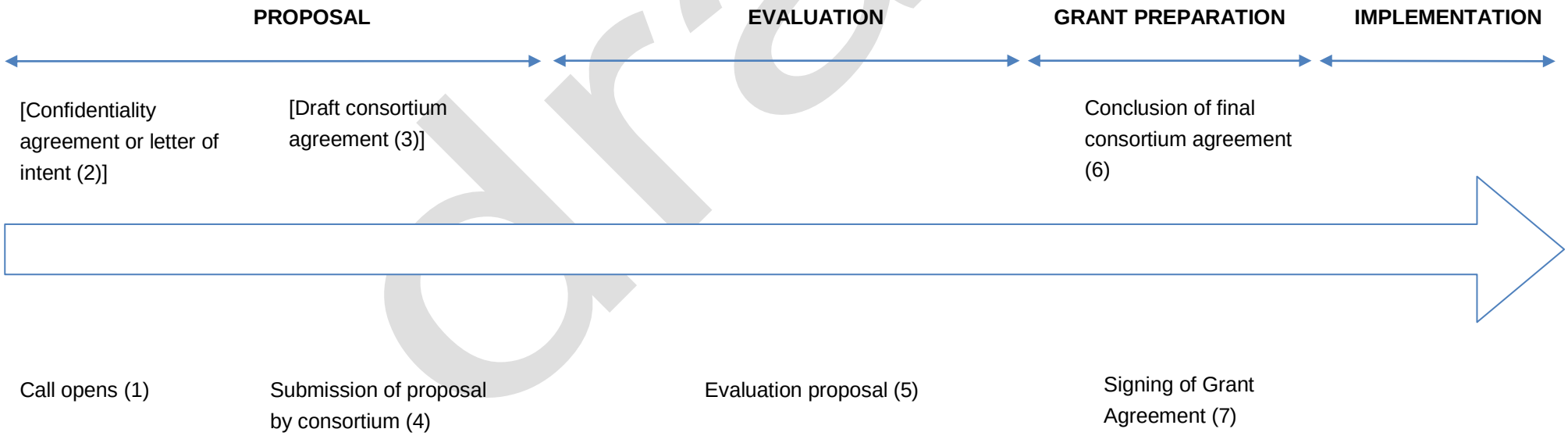
The different steps to set up an action under Horizon 2020 are shown in the timeline below. Where a particular step is optional, it is shown in [brackets].

i. **Proposal Phase** — the remaining period until the call for proposals closes (i.e. until the deadline for submitting proposals);

ii. **Evaluation Phase —** the period between the deadline for submitting proposals and the Grant Preparation phase (usually four to five months).

iii. **Grant Preparation Phase** — the period between the project coordinator's receipt of the letter informing the consortium of the status and preliminary evaluation of the proposal and the signing of the Grant Agreement (usually three months);

iv. **Implementation Phase** — the period from the signing of the Grant Agreement until all the obligations imposed by it have been complied with.



2. Proposal phase: Preparing the consortium

This section covers the initial discussions and negotiations between applicants looking to form a consortium, from the publication of the call for proposals to the deadline for submission of the proposal. Although this is an early stage, it is important that applicants are aware of some of the typical issues which may arise and ways to mitigate such risks.

2.1 Negotiations

In the proposal phase, initial negotiations take place between applicants looking to form a consortium that will jointly submit a proposal. They may exchange important information about the latest status of research, their approach to the action, and the goal of the work proposed. Consequently, it is important that applicants are aware that even in this early phase, appropriate care must be taken in discussions.

It is also crucial that applicants negotiate on the basis of the overall technical and commercial specifications of the particular action, rather than paying too much attention to specific internal policies or strategies. This will help them prepare a successful proposal and will make it easier to conclude a consortium agreement later. Additionally, they must be clear about each applicant's operational capacity, and how it complements the others' capacity also in terms of access to any pre-existing intellectual property they will need to implement the action. The applicants should commit themselves to supplying the individual operational capacity specified; if these commitments are not binding and the proposal is selected, further negotiations on this topic may jeopardise the starting date of the action, and even its completion.

Some of the typical issues to be taken into account in negotiations at the proposal stage are set out below (section 2.2), together with a way of mitigating some of these risks by concluding agreements (section 2.3).

2.2 Typical issues

Typical issues arising at the proposal stage include the confidentiality of information exchanged, and potential infringement of trademark rights when choosing a name and acronym for the project/action:

- **Confidentiality**

  The exchange of information between applicants entails a risk that confidential information — such as inventions not yet protected by patents, or information on market needs — may be disclosed or used for other purposes. To avoid any misappropriation or unauthorised use of information, it is best practice and strongly recommended that the applicants enter into certain obligations regarding confidentiality. A confidentiality obligation covers two types of restrictions: (i)

restrictions on the use of confidential information, and (ii) restrictions on disclosing such information.

It is customary to agree that passing on confidential information exchanged between applicants to a specified circle of (natural or legal) persons is permitted on a 'need to know' basis and subject to certain conditions. An example of parties with whom confidential information may be shared if appropriate are an applicant's linked third parties such as affiliated entities**.** To this end, the concept of 'linked third party' or 'affiliated entity' needs to be defined (using the definitions provided in the Grant Agreement, or another) so that it is clear which persons are covered by the confidentiality obligations. In practice, to avoid having each applicant's linked third parties or affiliated entity/entities sign confidentiality obligations, the applicants will often guarantee that any confidentiality obligations they have will also extend to their linked third parties as defined in the (confidentiality) agreement. Scenarios in which a linked third party stops being linked to a given applicant (e.g. an affiliate entity is sold, or is part of a merger) should also be taken into account when establishing the confidentiality obligations, for instance by stipulating that in such a case the entity is obliged to return any confidential information that it has received.

Applicants should also be aware that the information exchanged among them with a view to preparing the proposal may also be disclosed to the employees or other staff of applicants. Although employees often have a duty of confidentiality to their employer under local labour laws, it is nevertheless recommended that they are made aware of their specific obligations to keep information confidential. Consequently, applicants should also guarantee that those employees or other staff with whom the information will be shared on a 'need to know' basis will keep such information confidential. Additionally, it is recommended that the confidentiality obligations continue after they stop working for the applicant, if this is allowed by local laws.

- ➢ Action point: At this stage, while it is important to create trust in the consortium, applicants should not lose sight of protecting their confidential information.

- **Trademark infringements**

At the proposal stage, applicants need to choose a name and acronym for their action, one which will not create any confusion with existing names. The choice may be limited by the intellectual property rights of others, in particular to trademarks and domain names; do not overlook this possibility. Care should be taken not to select a project name or acronym which is identical or similar to a registered trademark or domain name of a third party, especially one that is active in the same area of business. Avoiding using a name which has already been registered as a trademark or domain name by others is especially important if applicants plan to commercially

exploit any results from the action at a later stage under this name.

- Action point: Although it is not easy, there are tools available to help applicants search for previous trademark or domain name registration. For trademarks, free search tools are provided by the Office for Harmonisation in the Internal Market (OHIM), for Community (EU) trademarks, and by the World Intellectual Property Organisation (WIPO). Applicants may also contact their national intellectual property office. For domain names, Applicants may check their suggested project name in the WHOIS database.

2.3 Possible agreements in the proposal phase

The recommended way of mitigating the risks of confidential information being disclosed when the applicants are preparing a Horizon 2020 proposal but have no formal contractual obligations is to conclude an agreement. This gives the parties some legal certainty and will facilitate the cooperation in general and exchange of information in particular:

- **Letter of intent.** A letter of intent (or 'memorandum of understanding') is an agreement outlining the framework of negotiations among applicants. A letter of intent is typically concluded at the beginning of the negotiations on involvement in an action. It is strongly recommended that applicants conclude either letter of intent or a confidentiality agreement (see below) before submitting a proposal. Setting out their converging intentions together with rules on communication, exchange of information, confidentiality, reporting, and conditions of termination of the agreement, gives the parties a framework for further negotiations. The coordinator of a Horizon 2020 action is required to declare that all applicants have given their explicit consent to participation and to the content of the proposal, so the letter of intent may contain wording giving this consent.

  A letter of intent serves as a (legal) basis for various types of other agreements. It is not usually binding, but applicants may decide to include some binding provisions (such as confidentiality obligations). Even if not binding, a letter of intent is more formal than a 'gentlemen's agreement', which is often not put in writing. Signing a letter of intent makes the applicants' interest in achieving a common outcome official, and may make a successful outcome more likely.

- **Confidentiality agreement.** A confidentiality agreement sets out the conditions according to which applicants may disclose or use information which may be secret or confidential in a particular context (i.e. defining the research idea for the Horizon 2020 proposal). It is the applicants' responsibility to define exactly what kind of information is confidential and not to overlook this task, as the definition will affect any obligations not to disclose such information.

Typically, confidentiality obligations are limited in time, often starting from either the effective date of the agreement or the date on which the confidential information was communicated. The disadvantage of the first limit is that any confidential information communicated by an applicant shortly before the confidentiality obligation/agreement expires will only be protected for a short time. However, any consortium agreement the applicants then sign will typically also include confidentiality obligations and thus maintain confidentiality.

Since a breach of confidentiality may cause significant damage, and the amount of damage is often difficult to prove, applicants may agree to include a contractual penalty in the confidentiality obligations to secure compliance. When determining the amount of the contractual penalty, local laws should be consulted.

- **Draft consortium agreement.** It is strongly recommended that, even in the proposal stage, applicants prepare at least a draft consortium agreement. This enables them to discuss and agree on how to handle important (and often sensitive) matters such as intellectual property rights, confidentiality and dissemination. This draft can be used as a starting point for further discussions if the proposal is accepted.
- The draft consortium agreement should also clarify the **management of roles and user rights** of persons involved in the proposal/project to the **Participant Portal**, the Commission's online platform for managing Horizon 2020 proposals and grants. Further information on these matters is given in section 3.2 ('Typical content').

3. Grant preparation phase: Setting-up the consortium agreement

For successful proposals, the 'Grant Preparation Phase' follows the Evaluation Stage, and runs from the reception by the coordinator of the 'invitation letter' to the signing of the Grant Agreement.

In this phase applicants have to provide additional administrative and technical information necessary for preparing the Grant Agreement. Any preliminary agreements between the applicants (now officially 'members of the consortium') should be replaced by a consortium agreement in principle to be concluded before the Grant Agreement is signed.

3.1 Considerations in negotiating a consortium agreement

The consortium agreement allows consortium members to settle details specific to the proposed action that are not fully governed in the Grant Agreement, such as work organisation, IP management, liability, future exploitation and dissemination of results, and any further matters of interest to them.

A more detailed overview of the typical content of a consortium agreement and sensitive issues to be taken into account is given below.

3.2 Typical content

A 'consortium agreement' is not defined as such by any applicable law. Consequently, the agreement itself must spell out the consortium parties' rights and obligations with regard to matters that are necessary to properly execute the action.

In principle, the consortium agreement may provide for any arrangements the parties wish to make, as long as they are not contrary to the Grant Agreement and the Rules for Participation.

Typical provisions are given below in the order in which they are usually set out.

- **Parties**

  At the beginning of the agreement, the parties to it (members of the consortium — the corresponding term in the Grant Agreement is 'beneficiaries') must be specified, using each party's official name. Throughout the agreement the parties are typically referred to as 'Party' or 'Parties'. It may be appropriate in some circumstances to add other interested parties beyond beneficiaries to the consortium agreement (e.g. linked third parties).

- **Preamble**

  The preamble sets the scene and provides the context for the agreement. It may refer to any agreements previously concluded by the parties in the same context, such as a letter of intent or confidentiality agreement, and to the Grant Agreement to be

concluded and the relevant call for proposals.

- **Definitions**

  If the parties want to define certain terms used in the agreement, they may do so in this section. The reason for defining specific terms is to preclude misunderstandings between the parties about the scope of a particular right or obligation. Where relevant, the definitions given in the Grant Agreement are typically also applied in the consortium agreement.

  For example, the definition of 'confidential information' is very important and should be treated with great care by the parties, as it determines which information is subject to confidentiality and use of which may therefore be strictly limited.

- **Technical provisions**

  The technical provisions included in a consortium agreement typically govern matters such as the tasks assigned to each party, the project schedule, how changes can be made to the action, the conditions for involving third parties (e.g. linked third parties or subcontractors) in the action, etc.

- **Managerial provisions**

  Managerial (or 'governance') provisions often form the bulk of the consortium agreement. Since a consortium by definition involves numerous different parties, often from different Member States, with different languages and customs, it is important to state the rules to be followed to efficiently manage and organise the consortium. Adequate management of the consortium is crucial to achieving results under the action, and to efficient dissemination and exploitation later.

  Managerial provisions typically govern the establishment and functioning of coordination and management bodies, the powers and responsibilities of such bodies, and the voting rules. They may say how often meetings will be held, how parties should communicate and correspond with each other and the management bodies, how the action should be followed up and supervised, what rules will apply if a partner wants to leave the consortium or if a new party wants to join when the action has already started, etc. The larger the consortium, the more detailed the management rules need to be.

  To manage the results arising during an action, one or more management bodies can be appointed, such as an exploitation committee, chaired by an exploitation manager, tasked with helping the parties to identify and watch over any intellectual property arising from the work and advising on suitable strategies for such intellectual property. Alternatively, the consortium members may set up a project steering committee, which manages the major action issues and ways of exploiting and

disseminating the results.

- **Financial provisions**

  In actions funded via Horizon 2020, the specific financial provisions of the Grant Agreement apply and must be reflected in the consortium agreement. For example, the consortium coordinator is tasked with receiving payment of the funding and must distribute it among the consortium members; any specific arrangements made between the consortium members in this respect should be reflected in the consortium agreement but must not conflict with the general rules set out in the Grant Agreement. The consortium's budget for the action is generally attached as an annex to the agreement, or forms part of the work plan. The budget consists of the eligible costs broken down by party and budget category, and the reimbursement of eligible costs.

  It is recommended that the agreement set out very precisely the specific contributions of all the consortium parties, in cash or in kind.

  Beneficiaries are also advised to foresee the potential implications of receipts in the consortium agreement (given that the receipts will be appreciated at the level of the action and not anymore on the level of each beneficiary as was the case in FP7). Receipts generated by one beneficiary may result in a reduction of the grant due to the application of the non-profit rule (see Article 5.3.3 of the H2020 model Grant Agreement). Such reduction will be calculated at the level of the action (consortium level) and not at the level of the individual beneficiary generating the receipts. If receipts are expected, it is important that the consortium agreement determines how this situation would be handled by the consortium.

- **Provisions relating to exploitation and dissemination of results**

  Within the limits of the grant agreement, the consortium agreement must provide for flexible and efficient rules to foster and support cooperation between the beneficiaries, to both protect and enable maximum exploitation of the results and to ensure it is disseminated efficiently.

  Such rules may include the identification and agreement on the background (e.g. positive or negative list), how results will be identified, reported, kept confidential and protected, how joint ownership will be regulated, the agreement on different notice periods for transfers and dissemination as well as on additional rules regarding access rights (e.g. concretising conditions for obligatory access rights, agreement not to give access to affiliated entities established in an EU Member State or associated country, developing additional rules on written requests for access rights, agreeing on additional or more favourable access rights, deciding whether access rights remain if a beneficiary is in breach of its obligations).

- **Liability and warranty**

  An important aspect to cover in a consortium agreement is the liability of each party for actions or omissions under the action and possible warranties given.

- **Boilerplate provisions**

  So-called 'boilerplate provisions' are standard contractual provisions included in agreements of all kinds. They govern the basic terms of an agreement, such as its duration and termination, dispute settlement (in court, via arbitration or via mediation), contact persons for correspondence, and the law applicable to the agreement. Some other topics of boilerplate provisions are:

  - Waivers. These allow the parties to give up the right to sue the other parties for breach of a particular provision without giving up any future claims under that provision.
  - Severability. This permits a court to take out an invalid provision while still keeping the rest of the agreement intact.
  - Assignment. This refers to the ability of the parties to sell or transfer their rights under the agreement to another party. Parties may decide to prohibit any assignment of rights, to allow for assignment of rights to affiliated entities, etc. Generally, if a party is allowed to assign its rights to an affiliated entity, this does not relieve that party from its obligations under the agreement.
  - Force majeure. This provision establishes that no party to the agreement will be responsible for failure or delay in performing its obligations due to circumstances beyond its reasonable control. The circumstances referred to by this clause usually include — but are not limited to — fire, floods, storm, earthquakes, war, terrorism, labour disputes (strikes), fuel shortages and transportation embargoes or failures.

- **Granting and revoking user rights in the Participant Portal**

  The electronic-only proposal and grant management under Horizon 2020 will allow authorised users of the so-called Participant Portal to access, at any time, the full set of project information (such as the original proposal, the grant agreement, technical project description, reports, financial statements, project-related correspondence, etc.) and to initiate transactions (filling forms, uploading documents, submitting information, signing documents).

  Most of the respective user rights can be freely assigned and revoked to any persons by the consortium, according to its needs.

To avoid unauthorised access to information and unauthorised transactions for a project, the consortium agreement should include provisions on the management and continuous maintenance of user rights assigned to persons involved in the project. These should cover, inter alia, the handling of cases of persons leaving the project or the organisations or changing position, or beneficiaries terminating participation.

Further information on the Participant Portal and on the handling of user rights is given on the relevant pages of the Horizon 2020 Online Manual here: http://ec.europa.eu/research/participants/docs/h2020-funding-guide/user-account-and-roles/my-area_en.htm.

3.3 Typical sensitive issues

Some sensitive and controversial issues encountered when drafting or negotiating a consortium agreement are outlined more in detail below.

- **Protection and dissemination of results**

  Another possibly controversial issue is the different interests of the parties. Some parties' interest may primarily lie in disseminating the results, e.g. in dissertations or scientific papers, and in using the results for teaching and academic purposes. This could present a conflict of interest with other parties' intention to keep the results confidential so as not to lose any competitive advantage.

  Publication rights can be especially controversial in situations where the action is carried out as part of a dissertation to be submitted to the university involved in the action. Furthermore, premature dissemination may be problematic if the results are eligible for patent protection, in which case a novelty requirement applies and the results must be kept confidential for a specific period.

  The grant agreement requires a beneficiary to notify the other beneficiaries prior to dissemination. This allows the beneficiaries to review the content beforehand and, where applicable, to seek patent protection for the results concerned. Beneficiaries are advised to foresee further arrangements to ensure that decisions on dissemination take due account of the interests of all beneficiaries concerned (and yet allow for publication of results without unreasonable delay). This could include a specific conflict resolution system for possible disputes in this regards.

- **Intellectual property rights**
  - Joint ownership. If two or more beneficiaries (parties) jointly generate results under the action, and it is not possible either to establish their respective contributions or to separate the results for the purpose of protecting them, they will jointly own those results. The Grant Agreement provides that the joint owners must agree (in writing) on the allocation and terms of exercise of their joint ownership. This may be a topic for the consortium agreement, in particular regarding the general principles. The conditions of joint ownership are often disputed and not uncontroversial, as they may give rise to discussions between the parties following the completion of the results. Where no clear arrangements have been made by the parties with respect to the jointly owned results, joint ownership may endanger the efficient exploitation of the results, and may give rise to other difficulties, for instance in assessing the shares of the jointly owned results that each party is entitled to.

    If results are jointly created and the joint owners do not want a (default) joint ownership regime, they are free to decide upon any other ownership regime, such as the transfer of the results to one party/owner, and the grant of access rights to the others. However, note that this may only be done once the results have been generated.
  - Sideground. In addition to background, the parties may also develop or acquire technology or intellectual property alongside the project work which may be useful for the implementation of the action or the exploitation of its results. The parties may want to determine rules on when and how to provide access rights to such sideground but must consider that the nature and value of such sideground will be unknown at the start of the action.
  - Third party involvement. If parties require assistance for the implementation of the action or the exploitation of its results from (linked) third parties, it is important that the consortium agreement explicitly includes this situation, in particular where these third parties will play a significant role. Beneficiaries may need to put in place additional rules (e.g. additional confidentiality obligations and additional (reciprocal) access rights) and must ensure that any agreements with these third parties contain provisions that allow them to respect their obligations under the Grant agreement and, where applicable, the consortium agreement.

- **Liability and warranty**

  A party may be inclined to try to limit its liability in case it is not in a position to build up sufficient financial reserves to deal with cases where it must pay financial indemnity or penalties. This is specifically the case for small enterprises, start-ups and non-profit research institutions.

  Another problem is that parties are generally at high risk of damages which cannot be foreseen and/or are often impossible to calculate in advance. Liability in the event of infringements of third party rights is also a critical issue. Parties should decide whether or not they will warrant in the consortium agreement that their background or results do not infringe third party rights. Such warranty always presents a certain degree of risk as it is almost impossible for a party to check worldwide whether a third party's intellectual property rights may coincide with the results. Moreover, certain parties may be reluctant to participate in the action if no reasonable liability cap is foreseen. Finally, when limiting liability in a consortium agreement — or any agreement for that matter — it is important to check whether the applicable law allows the limitation of liability sought. In many countries, for instance, excluding liability for fraud, wilful misconduct and/or personal injury or death is not allowed.

4. Conclusion

This document provides consortium members in a multi-beneficiary action under Horizon 2020 with an overview of the main pitfalls in forming a consortium, best practice for success, and the typical content of and sensitive issues encountered in drafting a consortium agreement. In each of the main phases of the action, i.e. the proposal and grant preparation and implementation phases, beneficiaries have certain tasks to complete, requirements to meet. A good consortium agreement will make it easier to work together.