

Instruction and explanation to Consortium Agreement Template for ZonMw funded Projects

In this document, you will find instructions and explanations for the use of the ZonMw Consortium Agreement template. Please note that this is meant only as aid for drafting the consortium agreement without assuming any warranty of responsibility by ZonMw. We point out what the most important steps are for filling in the template and direct you through parts that are more difficult. Please read this document carefully before completing the template.

The use of the template is however at the user's own risk and does not release the user from its own legal examination to cover its interests and protect its rights. No rights can be derived from the use of this template.

Guiding principles and instructions before filling in the template:

- A. We would appreciate and strongly recommend to make use of this template Consortium Agreement (further 'CA') .
- B. Modifications must be recognisable for ZonMw (i.e. use track changes).
- C. Please explain changes, use of optional clauses or additions.
- D. Some sections contain parts that are optional or need to be customised. Read the information carefully and assess if they are applicable for your situation and change them if needed. Optional wording or clauses in the template are indicated in cursive and blue. This explanation provides extra options apart from the options in the CA itself and optional alternative clauses.
- E. Part of the clauses may be described in full detail in the Project Plan. In such case please refer to the (relevant section of) the Project Plan or accompanying Budget.
- F. Organisations are advised use the services of an expert (technology transfer office (KTO) or legal department) to draft the consortium agreement.
- G. ZonMw policy regarding project results: ZonMw funds health research and innovation and stimulates the use of the results to help improve health and healthcare in the Netherlands. The ZonMw policy as described for instance in section 11 of the [ZonMw General Terms and Conditions](#) aims to ensure that publicly financed results of its projects are freely available to be shared and reused in particular for new (scientific) research. ZonMw can make an exception to this rule at its own discretion in the event that knowledge valorisation is the purpose of the ZonMw programme/call.
- H. The agreement will be assessed on conformity with the European state aid rules and regulations, the ZonMw General Terms and Conditions and the ZonMw decision to award the grant. More specifically, the collaboration agreement will need to fulfil the conditions of an 'effective collaboration' (par. 2.2.2 [Framework for State aid for research and development and innovation](#)); in short:
 - a. Independent parties
 - b. Division of labour
 - c. Pursuing common objective
 - d. Each contributing to the implementation
 - e. Sharing risks
 - f. Sharing results
 - g. Dissemination of results
 - h. Access to and rules for allocation of IPR
- I. This template is drafted for a 'standard' situation. In the event the call text or Grant Decision contains specific further conditions or requirements, certain provisions of this template may not suffice.
- J. If requested, send a final draft version of the CA (not signed) as a Word document indicating changes/additions to the template. ZonMw will assess the draft CA and give feedback.

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CONSORTIUM AGREEMENT

- **Project title** Fill in the project name or the name of the consortium agreement.
- **ZonMw file No:** Please fill in the file number which has been assigned to you by ZonMw. You can find this number in the ZonMw Grant letter.
- **Date:** Fill in the date on which the CA is finalised.

BY AND BETWEEN

- Add the name of the party that bears the administrative responsibility ('bestuurlijk verantwoordelijke') as Organisation X. This is the legal entity to whom the Grant is awarded. This is the organisation responsible for the distribution of the funds (section 8) amongst others.
- Add the names of the parties involved in the collaboration and the names of the persons who legally represent these parties. The parties that take part in the consortium will need to correspond with the names that appear in the project proposal.
- If you as a natural person own the business, your full name will be sufficient;
- If your business is a general partnership you will have a written partnership agreement that gives a name to the partnership. If you have not agreed on a name for the partnership then list the full names of the partners;
- For private legal persons: mention the type of legal person such as a foundation, an association, an open corporation or closed corporation;
- For public legal persons: mention the type of organisation such as province or municipality and the name of the organisation.

Add for each of the signing parties an abbreviation for further use in the consortium agreement, for ease of reading.

A party who is hired, has to be hired via a separate agreement (for providing services such as a Clinical Trial Agreement).

WHEREAS

Please fill in the information which is asked for in []. Remember from now on to use the abbreviation when asked for organization X,Y et cetera.

NOW, THEREFORE, IT IS HEREBY AGREED AS FOLLOWS:

1. Definitions

Here you will find definitions of the most used terms that have a special meaning. For the ease of reading, these terms will be stated with a capital letter in the rest of the CA.

Background: to prevent confusion, parties may wish to list a description of the Background provided to the Project.

Project Proposal: if a budget has been adjusted, this adjusted budget will need to be attached together with the Project Proposal (Schedule 4).

Optional: If the parties wish to include the possibility for participation of their affiliates in the consortium, including a definition for 'Affiliate' is recommended. The same applies for a definition for 'General Assembly'. The Parties may introduce additional definitions for terms specifically related to their project and their contractual relationship.

2. Purpose

Please fill in the information which is asked for in [].

3. Term and Contribution

Read the information. No actions needed in this section.

4. Responsibilities of all Parties

Project Governance by way of a General Assembly (section 5 below) is optional. Therefore reference to such consortium body will only need to be included if applicable.

Optional: please insert Schedule 5, the template for accession, if optional clause 4.6 -to admit new parties to the consortium- is included. According to section 4 of the ZonMw General Terms and Conditions, material changes such as involvement of other parties will need the prior approval of ZonMw. Failure to notify ZonMw can affect the ZonMw decision with respect to the continuation of the project and the amount of the grant to be determined.

PLEASE NOTE:

If 'effective collaboration' a condition of the call is regarding collaboration between Research Organisations and Undertakings, parties may not be added to the consortium once the agreement has been entered into effect. The reason for this is that the regarding conditions can no longer be fulfilled and the risk of illegal state aid will arise. The optional clause 4.6 cannot be included in that situation.

5. Project Governance

The governance provisions need to provide a solid structure for managing the project with regard to the execution, monitoring and reporting of the activities in order to comply with principle H under H.b (page 1).

If section 4.6 (accession of a new consortium party) is included, it will be necessary to include the decision making provision, please check option 5.2.2.

Option: This clause provides a governance structure for small projects, other governance structures may be included.

Example:

- a) Proposals for changes of the Project, to ZonMw;
- b) Changes to the distribution of the budget, to be agreed by ZonMw;
- c) Entry or withdrawal of a Party to/from the consortium and approval of the settlement on the conditions thereof, to be agreed with ZonMw;
- d) Identification of a breach by a Party and handling a defaulting Party (the Party in breach does not have a vote in this decision);
- e) Permission or objections for Publications according to the ZonMw regulations;
- f) IP issues according to the Consortium Agreement.

Another more extensive optional alternative is formation of a project team.

Example:

General Assembly is responsible for strategic and (scientific) management of the Project. The General Assembly shall be incorporated on the Effective Date and consist of one representative from each Party (hereinafter referred to as "Member"). Each Member shall be deemed to be duly authorised by the Party it represents to deliberate, negotiate and decide on all matters listed in article 5.2 of this Consortium Agreement. The Project Leader shall act as the Chairperson in all meetings of the project team, unless decided otherwise by the Project Team.

The Parties agree to abide by all decisions of the General Assembly.

Optional alternative: For larger projects, the parties may decide to have a two tier governance with a General Assembly and an Executive Board. The detail in which the governance of the project is set up greatly depends on the complexity of the project, the number of work packages and the

number of project partners. For an example of a project governance model, please see the DESCA Horizon2020 model consortium agreement: <http://www.desca-2020.eu/>.¹

6. The Project Leader

The Project Leader (“Project Leader”/ “Penvoerder”) is responsible for the day-to-day management of the project. The Project Leader also acts as an intermediary between the parties and ZonMw; all communications between ZonMw and the consortium will be through the Project Leader.

Optional alternative: The default situation is that the Project Leader is an employee or in service of the grant applicant (Organisation X). Apart from the obligation to transfer or withhold payment or reclaim funds and the right to terminate (as stated in sections 7.1, 7.2, 7.3, 8.2.1 and 8.3), rights and responsibilities may be transferred to another party. This authorised person is indicated as ‘executive Project Leader’. If an executive Project Leader is appointed, it is recommended including the word ‘executive’ throughout the text of the consortium agreement wherever applicable.

Example:

The Parties agree that the power to carry out specified responsibilities and rights will be transferred to [Party ●] and authorise said Party to act as executive Project Leader and to carry out the rights and responsibilities set out in sections [●, ●].

7. Termination of a Party’s participation

Take into account the consequences for the Project and the obligation to notify and obtain prior approval of ZonMw.

Optional alternative; insert the body that will be entitled to terminate a party’s participation in case the organisational structure is different (for instance General Assembly depending on applicable governance structure, section 5).

Option: Parties may wish to include a period of time in section 7.1.3 for Force Majeure. What is considered to be reasonable will depend on the duration of the project, amongst others. ZonMw considers 90 days reasonable for projects less than 2 years and 6 months for projects for a longer period of time.

8. Financial provisions

Optional: Parties may include provisions regarding justification of costs, such as optional clauses 8.4 and 8.5.

9. Liabilities

Research collaboration agreements typically contain a ‘fit for purpose’ provision, i.e. information, a product or service is adequate for the purpose for which the relevant party made it available to the consortium partners

Optional: other provisions may be included taking Guiding principle H.e (page 1) into due consideration with regard to (proportional) distribution of financial and other risks.

10. Access to background

It is recommended to pay close attention to the definition relating to specific knowledge made available by a party for the purpose of the project (pre-existing knowledge, also known as ‘background’) and the definition of the results (all project outcome, see section 11 below and the definitions). The scope of these definitions will affect the (ownership- and access-)rights of the parties in relation to such knowledge.

Implementation. The default situation is that a party will grant access to its background to all parties (section 10.1). However, a party may decide to only grant access to a party that “needs”

¹ The DESCA Horizon 2020 Model Consortium Agreement was specifically designed for Horizon 2020 "Research and Innovation Actions" and "Innovation Actions".

the background for the execution of his part of the research. Also, access by affiliates can be made conditional of approval by the owner of the background or can be excluded.

Example

1. *Each Party grants the other Parties a royalty-free, non-exclusive license to use its Background for the term of this agreement and to the extent Needed for the execution of the Project.*
2. *No Party may grant a sub-license to another Party's Background without the prior written permission of that Party.*

Please note that this provision requires a definition of "Needed".²

Example:

1. *For the implementation of the Project, "Needed" means:*

A license to another Party's Background is Needed if, without the grant of such license, carrying out the requesting Party's share of the Project would be impossible, significantly delayed, or require significant additional financial or human resources.

2. *The requesting Party must show that such a license is Needed.*

Optional: More and more parties will need access to another party's software for the execution of the Project. In such a situation the following clause can be included:

The conditions which are included in this section are applicable to access to software.

11. Results

With regard to the project results, the consortium agreement will need to contain provisions regarding (joint) ownership, transfer, access rights and dissemination at least. The default ZonMw arrangement is based on the principle of "inventor is owner". ZonMw cannot accept a consortium agreement that determines the market value of the results up front as the value of the results can only be established after they have been generated. In order to comply with the relevant European state aid rules (see Guiding principle H. especially H.h (page 1) and sections 19 and 21 Terms and Conditions Governing Grants of ZonMw) the following need to be taken into account:

- a. For the avoidance of potential (indirect) benefit and illegitimate state aid as a result, transfers of or licenses to (joint-)Results to an Undertaking will need to be negotiated at arm's length terms and on market conditions (11.5.1).
- b. Optional alternative 11.2: Contractual division of ownership. If parties jointly generate results and they do not wish to own the results jointly, they can agree that one party will own the results (e.g. the party that contributed the background IP or the party that generated the greater part of the results) on the condition that grant applicant will be granted a perpetual, worldwide, non-exclusive, fully paid-up license (11.5.2).

Example:

1. *Ownership of Results generated by two or more Parties ("Joint Results") will be determined in good faith, taking into account each Party's relative intellectual contribution to the Joint Results.*
2. *The Parties jointly owning the Results ("Joint Owners") will use reasonable commercial efforts to conclude a joint ownership agreement that includes clauses with regard to:*
 - a. *a procedure for determining the respective ownership percentages of the respective Joint Owners;*
 - b. *arrangements for protection of Joint Results, including -if applicable- filing, prosecution and maintenance of patent(applications) for any Joint Results;*
 - c. *action taken with respect to any alleged or actual infringement of intellectual property rights relating to any Joint Results;*

² Please see the DESCA Horizon2020 model consortium agreement: <http://www.desca-2020.eu/>

3. *If one or more of the Joint Owners do not wish to protect the Joint Results, the other Joint Owners may do so at their own expense. The Party not participating in the protection of the Joint Results will provide –at the expense of the requesting Party– assistance to the Joint Owners that wish to protect the Joint Results.*

- c. Optional alternative 11.3, 11.4: if provisions for valorisation and (future) exploitation are the purpose of this collaboration and are in line with the purpose of the call and the Grant Decision (as stated in Guiding principle G), this need to be made explicit in this section of the agreement (and the “whereas” section). Parties may include provisions regarding a patent application and IP management strategy and provisions regarding reasonable efforts towards valorisation and exploitation (which will need to include anti-shelving provisions). This can also include a provision stipulating the right of the other Parties to seek protection of valuable results in case the owner of the results fails to do so. Please check section 8.3 of the [Desca model](#) for options.
- d. Optional: if a Party intends to transfer its results to a third party, it may be required to inform the other Parties first and give them the opportunity to negotiate first with said Party (“1st option right”).

Example:

If a party intends to transfer its (share in joint) results to a third party, she will inform the other Parties/Party [...] first and give them the opportunity to negotiate first (1st option right).

If such is made a condition of the call or if applicable to one of the participating Parties (such as academic medical centres), please refer to the 10 Principles for Socially Responsible Licensing by including the following:

The Parties will observe and adhere to the 10 Principles for Socially Responsible Licensing.

12. Publication

The default arrangement is ‘assumed permission’ and publication as soon as possible. ZonMw may allow embargo periods of a maximum of 3 months after the project has been completed and in case of expected exploitation rights in respect to IP results a maximum of 9 months (section 18.5 Grant Terms and Conditions ZonMw). These periods will need to be taken into account and approved by ZonMw. Include an explanation for the need to include an embargo period for publication.

13. Confidentiality

A confidentiality clause may not go beyond what is necessary to protect and may not infringe the publication provisions (freedom of publication will need to be observed).

14. Miscellaneous

14.1 Since this agreement contains several parts, it is possible that these parts are conflicting. For this situation it is necessary to include an inconsistency clause. Because the grant applicant is bound to the ZonMw Funding Conditions, these need to prevail.

14.2 and 14.3 According to section 4 of the ZonMw General Terms and Conditions, material changes such as involvement of other parties will need the prior approval of ZonMw. Failure to notify ZonMw can affect the ZonMw decision with respect to the continuation of the project and the amount of the grant to be determined.

15. Governing Law and Dispute Resolution

Please fill in the information which is asked for in [].

A choice of Dutch law is in line with the law according to which the ZonMw grant has been awarded.

Recommendation to include the Dutch court of the region in which the main applicant resides.

SCHEDULES

Referring to lengthy documents rather than inserting them, provides more clarity and brevity in the main body of the agreement.

- Schedule 2 – Attach the Grant Decision.
- Schedule 3 - Background made available by the Parties for execution of the Project. A description of the Background and any relevant restrictions and encumbrances associated with the Background;
- Schedule 4 – Attach the Full Project Proposal
- Optional: Schedule 5 – Attach the template for an accession template, if this is applicable to you.
- Optional: Additional Schedules may be added, such as:
 - [Identified Affiliated Entities;](#)
 - [A list of contact persons and addresses for official Notices.](#)
 - [A Model Term Sheet for the licence to be negotiated under a 1st Option Right which contains provisions for:](#)
 - [The identified Results](#)
 - [Start- and end date](#)
 - [Sublicensing allowed yes/no](#)
 - [Field of Use](#)
 - [Territory of Use](#)
 - [Payment \(lump sum and/or percentage of turn-over\)](#)
 - [Indemnity](#)

SIGNATURE

In witness whereof...

The person(s) who are stated at the section 'Organisation' under 'By and Between' must sign. ZonMw does not accept a Holding signing on behalf of a daughter or vice versa.