

Consortium Agreement Model

KWF Kankerbestrijding



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V1.0

Introduction

To contribute to its mission goals: less cancer, more cure and a better quality of life for (ex) patients Stichting Koningin Wilhelmina Fonds voor de Nederlandse Kankerbestrijding (hereinafter referred to as “KWF Kankerbestrijding”) funds oncology research and stimulates the use of the knowledge developed to help improve health and healthcare in the Netherlands. KWF Kankerbestrijding does so by funding and facilitating research, through the KWF Programme Research & Implementation.

This programme aims to ensure that the results of the research projects that are financed by KWF Kankerbestrijding (every invested euro) generate as much impact for its mission goals as possible.

Research Consortium

The KWF Programme Research & Implementation contains the funding type Research Consortium which is meant for research projects performed by or within more complex and/or bigger collaborations. A Research Consortium project proposal should be submitted if one of the following conditions is met:

- the proposal is performed by four (4) or more participating organisations (service providers not included)
or
- one or more for-profit organisations (companies) are involved as participating organisation and/or co-funder.
or
- the proposal is part of an ongoing collaborative project performed by more than three (3) participating organisations.
or
- the budget exceeds 1 million euros and at least two (2) participating organisations are involved.

In case of granting a Research Consortium KWF Kankerbestrijding requires the lead institute, represented by the project leader (the applicant of the project proposal), to submit a consortium agreement signed by all participating organisations to KWF Kankerbestrijding. KWF Kankerbestrijding offers the opportunity to submit a draft consortium agreement. KWF Kankerbestrijding subsequently assesses the draft consortium agreement on its conformity with the Terms and Conditions of KWF Kankerbestrijding. In case of non-conformity, the project leader is asked to make the proper adjustments in the agreement. In case of conformity the project leader is notified and the consortium agreement has to be signed by all participating organisations. The project cannot start before a fully signed consortium agreement is received and approved by KWF Kankerbestrijding.

Please note that KWF Kankerbestrijding is not a party in this consortium agreement, but requires the consortium to formally confirm their agreements and terms on how they will collaborate to ensure optimal collaboration and successful completion of the project.

Terms and Conditions

When funding a Research Consortium the terms and conditions of KWF Kankerbestrijding apply (hereinafter referred to as “Terms and Conditions”). These Terms and Conditions consist of:

1. the Funding Conditions KWF Kankerbestrijding;

2. the Financial Regulations KWF Kankerbestrijding;
3. the Audit Protocol KWF Kankerbestrijding;
4. and possible additional conditions included in the Grant Decision.

The version (YYYY) of the Terms and Conditions that applies to the consortium agreement is the version that is applicable at the time of granting the funding, this means the date of the Grant Decision.

Results

The consortium agreement should contain provisions regarding (joint) ownership, access rights, dissemination and implementation of the results of the research project.

When the term of the research project has expired drafting an addendum is required. This addendum will define and record the tangible results of the research project and the distribution of ownership of these results. This addendum is part of the Final Report, mentioned in the Terms and Conditions, and must be approved and confirmed in writing to the project leader and the lead institute by KWF Kankerbestrijding.

Roles and responsibilities

During the application and review process and after granting the funding for the research project KWF Kankerbestrijding distinguishes various roles and responsibilities. Please take these roles and responsibilities, as defined in the Terms and Conditions, into account when drafting a consortium agreement.

Amendment

If an Amendment (meaning: an addition, adjustment or a change and such, as part of the consortium agreement) is required and added to the consortium agreement, the lead institute, represented by its project leader, is required to submit the Amendment to KWF Kankerbestrijding for approval. KWF Kankerbestrijding offers the opportunity to submit a draft of the Amendment. KWF Kankerbestrijding subsequently assesses the draft Amendment on its conformity with the Terms and Conditions. In case of non-conformity, the project leader is asked to make the proper adjustments in the Amendment. In case of conformity the project leader is notified and the final Amendment has to be signed by all participating organisations. The project cannot continue before a fully signed Amendment is received and approved by KWF Kankerbestrijding.

Please consider the (financial) implications in case KWF Kankerbestrijding does not consent to the Amendment.

Definitions

The terms used in this document and its [example provisions](#) have the same meaning as the terms used in the Terms and Conditions. Please see the list of definitions in the Terms and Conditions. Additional terms used in this document have the meaning as defined in this Consortium Agreement Model.

KWF Consortium Agreement Model

In order to simplify drafting a consortium agreement for applicants in Dutch oncology research, this Consortium Agreement Model is developed in close collaboration with the Netherlands Organisation for Health Research and Development, also referred to as "ZonMw". Although a maximum effort was made to streamline the requirements of ZonMw and KWF Kankerbestrijding, the terms used in this document may differ in details from the terms used by ZonMw.

We recommend that this Consortium Agreement Model (as a model agreement) and the Terms and Conditions are discussed with the Participating Organisations before submission of the Project Proposal to KWF Kankerbestrijding by the Project Leader. A different model agreement is permitted.

If the Participating Organisations already have a licence and/or consortium agreement in force these agreements could also be accepted by KWF Kankerbestrijding as part of or even as a replacement of the Consortium Agreement if they meet the Terms and Conditions and can be clearly related to the Project and the current Participating Organisations. If these agreements do not fully satisfy the Terms and Conditions, then KWF Kankerbestrijding could decide to formulate and confirm additional conditions to the existing agreements in writing to the Project Leader and the Lead Institute.

The Consortium Agreement also has to be verifiably prepared in consultation with the Lead Institutes' Technical Transfer Office.

The Consortium Agreement Model includes explanations and example provisions. Further example provisions can be found in the DESCA 2020 model consortium agreement: <http://www.desca-2020.eu/>. Please be aware that the DESCA is supplementary to the EU Rules of Participation and the EU Grant Agreement and should always be read in combination with the latter two documents.

This Consortium Agreement Model is provided by KWF Kankerbestrijding without any warranty or representation. The use of this document is solely at the user's own risk and does not release the user from legal examination to cover its interests and protect its rights.

Cover

- Project Number;
- Project Title;
- Project Leader;
- Version No [];
- Date [YYYY-MM-DD].

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I. Reference to the KWF Kankerbestrijding Funding

Reference is made to the Terms and Conditions including the Grant Decision of KWF Kankerbestrijding to grant Funding for this Project as communicated to the Project Leader, the Lead Institute and the Participating Organisations.

Example:

"This Consortium Agreement is based upon the Terms and Conditions including the Grant Decision of KWF Kankerbestrijding to grant Funding for this Project as communicated to the Project Leader and Lead Institute (for the occasion of this Project representing all Participating Organisations) in the Grant Decision on [DD-MM-YYYY] with KWF Project number [•] and is made on [Project start date/ DD-MM-YYYY] hereinafter referred to as the "Effective Date".

BETWEEN:

II. The Parties

Under this heading all contributing Parties and their official representatives are listed.

a. Full legal name of the signing party

- 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 universities and hospitals and the name of the organisation.

b. The registered address

In the Netherlands registration in the Business Register is compulsory for every company and almost every legal entity. For further explanation, please see the website of the Dutch Chamber of Commerce: <https://www.kvk.nl/english>.

c. Principle place of business

If the registered address is not the principal place of business then also insert the address of the principal place of business.

d. Legal representation

The person inserted here will be the person authorised to sign the Consortium Agreement.

e. An abbreviation for each of the signing Parties for further use in the Consortium Agreement. This is not compulsory but is intended for ease of reading.

Examples:

1. *[name] University Medical Center, an institution, organised in accordance with public law of the Netherlands (section 1.13.2 Dutch Act on Higher Education and Scientific Research (WHW)), having its registered office at [•] and its principal place of business at [•], the Netherlands, in this matter duly represented by [full name], Head of the Department of [], hereinafter referred to as ["insert an **abbreviation**"];*
2. *Foundation [name], a health fund, established under the laws of The Netherlands, having its registered office at [•], The Netherlands, in this matter duly represented by [full name], Managing Director, hereinafter referred to as ["insert an **abbreviation**"];*
3. *[•] B.V., a limited liability company established under the laws of The Netherlands, having its registered office at [•], The Netherlands and its principle place of business at [•] The Netherlands, in this matter duly represented by [full name], Managing Director, hereinafter referred to as ["insert an **abbreviation**"];*

III. Reference to the Parties

Clauses in the Consortium Agreement that apply to all Parties refer to the listed entities as Party or Parties.

Example:

Hereinafter referred to, individually or jointly, as "Party" or "Parties".

IV. Whereas

This section contains a short (in bullets) introductory statement of the Parties. It will describe the reasons for the Parties to come together and execute the Project. It will mention the objectives and the scope of the Project and the specific expertise that each of the Parties will contribute. Although this statement can be used to interpret the agreement, it is not one of the operative provisions.

Example:

- *The Parties have considerable expertise in the field of [•];*
- *The Project Leader has submitted a Project Proposal to KWF Kankerbestrijding for a research project in relation to [•] on behalf of the Parties;*
- *The Project Proposal has been granted with a Funding of [•];*
- *The Parties intend to execute the Project as detailed in the Project Proposal and in accordance with the Terms and Conditions and the additional conditions of the Grant Decision;*
- *The Parties wish to specify their respective rights and obligations in relation to the Project and wish to lay down general rules concerning the organisation of the work, the management of the Project, and the use and Dissemination and Implementation of the Results;*

V. Main body of the agreement

1. Terms and their definitions

The Terms and Conditions stipulate that its terms and conditions relate to every Party involved in the Project. To optimise the synergy between the Terms and Conditions and the Consortium Agreement, the Parties may opt to use the definitions of the Terms and Conditions in the Consortium Agreement. If Parties opt not to apply to these definitions please provide a list of definitions.

Example:

The definitions in the Terms and Conditions and attached to this agreement in Appendix [•], apply to this agreement unless stated otherwise.

It is essential to pay close attention to the definitions relating to Background Intellectual Property Right (“Background IPR”) made available by the Participating Organisations for the purpose of the Project and Results (all Project outcome) as the definition of these terms will impact the (ownership and access) rights of the Parties.

Parties sometimes insert a provision with regard to the **purpose of the Consortium Agreement**.

Such a provision merely sums up the main issues the agreement addresses, such as the management of the Project and the rights and obligations of the Parties in relation to the Results. The provision in itself does not add anything to the rights and obligations of the Parties, nor does it clarify why the Parties have decided to jointly undertake the Project or what the objective of the Project is.

Example:

The purpose of this agreement is to specify the relationship among the Parties in relation to the Project in particular concerning the organisation of the research activities as outlined in the Project Proposal, the management of the Project and the rights and obligations of the Parties in relation to the Results.

2. Entry into force, precedence and duration

It is essential to determine when the Consortium Agreement takes effect (“Effective Date”). For instance, any confidential information shared with the other Parties before the Effective Date (e.g. during the consortium agreement negotiations) is not protected under the confidentiality clauses.

The Consortium Agreement prevails over all previous and later agreements that relate to the Project.

Likewise it is important to state when the Consortium Agreement will terminate.

Example 1:

This agreement will go into effect on the Effective Date and will continue in effect until [DD/MM/YYYY].

Example 2:

This agreement will go into effect on the Effective Date and will continue in effect until the termination or completion of the Project, that is until the Final Report is approved by KWF Kankerbestrijding and confirmed in writing to the Project Leader and Lead Institute.

3. Responsibilities of the Parties

In order to ensure the cooperation of all Participating Organisations in fulfilling the obligations towards KWF Kankerbestrijding resulting from the Terms and Conditions including the Grant Decision to grant Funding for the Project, the Parties may opt to attach both documents to the Consortium Agreement and refer to the obligations resulting from these documents in the main body of the agreement.

Example:

The Parties will execute the Project in accordance with this agreement and the Terms and Conditions including the Grant Decision, both attached to this agreement in Appendices [•].

The obligation to notify the other Parties of any information that is likely to affect the (proper and timely) execution of the Project is not only of importance in the relation between the Parties but also in the relation between the Lead Institute and KWF Kankerbestrijding. Parties can insert the obligation to provide the information necessary for the Project Leader to carry out its tasks and fulfill its obligations towards KWF Kankerbestrijding resulting from the Terms and Conditions.

Example:

Each Party undertakes to notify the other Party promptly of any significant information, fact, problem or delay likely to affect the Project.

Each Party will, at the Project Leader's first request, promptly make available all information needed by the Project Leader to fulfil its obligations towards KWF Kankerbestrijding.

The Parties can also decide to insert a more general obligation of the Parties to use reasonable efforts to cooperate with and assist the Project Leader in his¹ efforts to fulfill his obligations towards KWF Kankerbestrijding resulting from the Terms and Conditions including the Grant Decision in a timely and proper fashion.

There are numerous other responsibilities that can be included, such as the Parties obligations to:

- Cooperate with the Parties and diligently perform the Project activities as described in the full Project Proposal;
- Take reasonable measures to ensure the accuracy of any information or materials it supplies to the other Parties;

4. Project governance

The governance provisions should provide a solid structure for managing the Project with regard to the execution, monitoring and reporting of the scientific work and the financial and other relevant aspects. The framework of a governance model will consist of governance bodies such as a Project Leader and a General Assembly (all Participating Organisations are represented), their various responsibilities (e.g. organise meetings, submit scientific and financial reports to KWF Kankerbestrijding, host a KWF Kankerbestrijding site visit) and the procedures (e.g. voting procedures, termination of a defaulting Participating Organisation).

For most of the Projects funded by KWF Kankerbestrijding, the governance structure for small Projects consisting of a Project Leader and a General Assembly, will be sufficient.

¹ Where the term "his" is used in this document, please also read "her".

However, for larger Projects, the Participating Organisations 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 Participating Organisations.

The General Assembly is the decision-making body and generally each of the Participating Organisations has one vote in every decision (see d. Voting procedure). The Executive Board consists of a limited number of Participating Organisations and oversees the day-to-day execution of the project. The Executive Board reports on the progress to the General Assembly. The bodies will each appoint a chair person ("**Chair Person**").

Please see the DESCA 2020 model consortium agreement: <http://www.desca-2020.eu/>. The DESCA Model Consortium Agreement was specifically designed for Horizon 2020 "Research and Innovation Actions" and "Innovation Actions". It contains two modules for Governance Structure: DESCA 2020 model consortium agreement:

1. Module GOV LP for Medium and Large Projects: Complex governance structure: two governing bodies, General Assembly and Executive Board;
2. Module GOV SP for Small Projects: Simple governance structure: only a General Assembly.

As stated before in the introduction to this model agreement, the DESCA is supplementary to the EU Rules of Participation and the EU Grant Agreement and should always be read in combination with the latter two documents.

a. The Project Leader and Lead Institute

The Project Leader and Lead Institute act as an intermediary ("*pervoerder*") between the Parties and KWF Kankerbestrijding. All communications between KWF Kankerbestrijding and the Consortium will be through the Project Leader and the Lead Institute. The Parties can formally authorize the Project Leader and the Lead Institute to act on their behalf in relation to KWF Kankerbestrijding when this is required by the Terms and Conditions, including the Grant Decision. Please be aware that any material changes (e.g. termination of a defaulting Participating Organisation) to the Consortium Agreement will need the prior approval of KWF Kankerbestrijding.

Example:

The Parties appoint [Full name, capacity and affiliation] as Project Leader and Lead Institute [Full name] for this Project for the term of this agreement;

The responsibilities of the Project Leader and Lead Institute.

Example:

The Project Leader and Lead Institute act as the intermediary between the Parties and KWF Kankerbestrijding. The Project Leader and Lead Institute will act on behalf of the Parties in relation to KWF Kankerbestrijding when this is required by the Terms and Conditions;

The Project Leader and Lead Institute are responsible for:

1. *The overall management of the Project;*
2. *Preparing and chairing the General Assembly biannual meetings and the three-monthly conference-calls and preparing and sending the minutes of these meetings to the Parties ;*
3. *The coordination and integration of the research performed by the Parties under this agreement;*
4. *Keeping accounts of the funds distributed to the Project by KWF Kankerbestrijding and any third party sponsors and the distribution of these funds to the Parties;*

5. *Keeping accounts of the In-kind Contributions and the cash Contributions ("Own Contribution") of the Parties for the purpose of the Project;*
6. *Notifying the Parties of any official notifications from KWF Kankerbestrijding in relation to the Project;*
7. *Notifying KWF Kankerbestrijding of any changes within the Consortium such as the accession of a new Party.*

b. The General Assembly

Example:

a. The general assembly ("General Assembly") is the decision making body and consists of one representative of each Participating Organisation, namely the principal investigator ("Principal Investigator") as identified in Appendix [•] and is responsible for strategic and scientific management of the Project.

b. The General Assembly is responsible for strategic and scientific management of the Project.

c. The General Assembly will meet bi-annually and will:

1. *Review the research performed by the Parties;*
2. *Discuss scientific and technical issues;*
3. *Discuss the next phase of the execution of the Project;*
4. *Discuss new scientific developments in the field that need to be integrated;*
5. *Discuss intellectual property rights and the strategy pertaining to Dissemination and Implementation;*

c. Principal Investigator

Example:

The Principal Investigator of every Party is responsible for supervision and direction of the Project at the Participating Organisation.

The responsibilities of the Principal Investigator.

Example:

1. *The Principal Investigator is responsible for:*
2. *Communication with the other Principal Investigators;*
3. *Reporting the progress of the research to the Project Leader on a monthly basis and at the General Assembly.;*
4. *The timely and proper preparing of the KWF Kankerbestrijding progress reports and Final Report;*
5. *To host the KWF Kankerbestrijding site visit.*

d. Voting procedures

The General Assembly is the decision-making body and each of the Parties has one vote in every decision. The Consortium Agreement should specify the issues that the General Assembly can decide on, e.g. changes to the full Project Proposal, additions to the list of Background IPR as set out in Appendix [•], entry of a new party, withdrawal of a Party and the termination of the participation of a defaulting Party.

The Parties need to insert provisions with regard to:

1. A quorum: number of Parties present or represented at the General Assembly meeting necessary for valid decision making;
2. What constitutes a majority of votes under this agreement for a binding decision;
3. If and under what circumstances a Party can veto a decision.

Example

Each Participating Organisation has one vote in the General Assembly. The Principal Investigator should make reasonable efforts to attend the General Assembly as he is responsible for reporting the scientific progress of his Party's share in the research but also for voting on behalf of his Party on important Project matters. If he is unavailable, he can be represented by another (scientific) employee of the Party he represents. Alternatively, the Principal Investigator can decide to sign a proxy and have one of the attending Principal Investigators report and vote on his behalf (that is, on behalf of his Party)

The Parties may opt to include a procedure for a defaulting Party.²

The General Assembly will identify a defaulting Party. It will notify the defaulting Party of its failure to perform its obligations under the Consortium Agreement and give the defaulting Party a reasonable term to cure the breach. If the breach is not cured within that term or if the breach cannot be cured or the defaulting Party notifies the General Assembly that it cannot or will not cure the breach, the General Assembly will vote on termination of the defaulting Party. A defaulting Party cannot vote if the voting relates to the termination of its participation to the Project.

Likewise a procedure can be set up regarding a Party requesting to leave the Consortium or regarding the entry of a new party.

e. Consortium Meetings

KWF Kankerbestrijding encourages the Participating Organisations to organise a yearly scientific meeting for all research personnel to attend. The purpose of such a meeting is to report and discuss the progress of the research. Preferably, advisors or co-funders are invited as well.

Example:

The Project Leader will organise a yearly scientific meeting for all research staff (advisors and/or co-funders). The purpose of the meeting will be to report and discuss the progress of the Project. The first meeting will take place no earlier than 10 months and no later than fourteen (14) months after the Effective Date.

f. Reporting

The Parties can opt to coincide the reporting obligations of the Parties with the three-monthly conference-calls.

Example:

The Parties will report the progress of their work in the Project to the Project Leader on a quarterly basis. The report will be submitted 10 working days before the date set for the three-monthly conference-call.

To keep the Project Leader fully informed, the Parties can insert the below provisions:

Example

All relevant email, letter and fax communication between the Parties will be sent to the Project Leader. The minutes of additional meetings between some or all of the Parties will be sent to the Project Leader.

5. Involvement of third parties

In the event the Project is carried out in part or in whole by service providers as specified in the Project Proposal not being part of the Consortium Agreement, the Lead Institute and Participating Organisations shall ensure that, prior to the start of the Project, these service providers waive their rights and/or assign all rights to the Results to the Consortium.

² Please also see item 7, termination for breach.

If the Lead Institute and Participating Organisations fail to do so, they cannot comply with the Terms and Conditions regarding Dissemination or Implementation of the Results. In the event the Consortium receives Co-funding for the Project from a third party, the third party may be granted access rights to the Results. Parties will always negotiate reimbursement at arm's length terms and on market conditions. All agreements related to Co-funding will be attached to the Consortium Agreement in Appendix [.]

Example:

- a. *Parties may not sub-contract any part of their research activities under the Project Proposal except with the prior written approval of the other Parties.*
- b. *The Party engaging a third party in the execution of its share of the research activities under the Project Proposal, is responsible for the execution of those activities by the third party and for the third party's compliance with the provisions of this agreement.*
- c. *The Party engaging a service provider in the execution of its share of the research activities under the Project Proposal will ensure that the service provider will assign any rights to the Results it has generated to this Party.*
- d. *Agreements related to Co-funding are attached to this agreement in Appendix [.]*

6. Termination for convenience

Please note that some model consortium agreements include a provision which allows a Party to terminate 'for convenience'. This means that a Party can terminate for any reason. To mitigate the (financial) consequences of a termination for convenience, a provision can be inserted allowing for such a termination on the condition that the terminating Party pays any unpaid part of its (in-kind and cash) contribution at the date it effectively terminates the Consortium Agreement.

Example:

A Party may terminate for convenience with prior written notice of three (3) months, provided that it pays any unpaid and committed part of its Contribution to the Lead Institute at the date it effectively terminates the agreement.

Contribution: *the total cash contribution and the monetary equivalent of the total in-kind contribution of a Party according to the Project Budget of the Project Proposal as attached to this agreement in Appendix [•]*

It should be clear which of the provisions will survive termination or expiry of the Consortium Agreement. A party terminating the agreement will still be bound to the provisions regarding confidentiality and non-use. Also, the terminating Party will have to continue to grant access to its Background IPR for the purpose of the execution of the Project. Please see item 16 of this document ('Survival of Rights and Obligations') for an example provision.

7. Termination for breach of contract

1. The Dutch Civil Code contains provisions for termination for breach of contract. If Parties do not include provisions regarding termination for breach, the provisions in the Dutch Civil Code will apply.
Please bear in mind that article 6:265 of the Dutch Civil Code allows the rescission of a mutual agreement (e.g. a consortium agreement) in full or in part for every failure of a Party in the performance of one of his obligations, unless the failure, given its specific nature or minor importance, does not justify this rescission and its legal effects.

2. However, as this section of the Dutch Civil Code is (mostly) permissive law, it is possible to derogate from the articles of this section of the Civil Code. The Consortium Agreement can set out circumstances when a Party can be terminated, e.g. if a party is in breach (fails to perform on time or according to the Project Proposal or does not perform at all). The provisions should include a formal notification procedure (a notice of default) and a reasonable term for repairing the alleged breach. If after the reasonable term, the party has not complied, default arises and the other Parties can terminate the defaulting Party and demand compensation (unless the defaulting Party can claim Force Majeure). If the fulfilment of a Party's obligation under the Consortium Agreement is permanently or temporarily impossible, this procedure need not be followed and the obligation of the Party that is in breach to pay a compensation arises automatically (unless that Party can claim Force Majeure).

Example:

The Parties may terminate a Party with immediate effect by giving Notice to the other Party if: the other Party is in breach of any provision of this agreement and (if it is capable of remedy) the breach has not been remedied within [30][60][90] days after receipt of the Notice specifying the breach and requiring its remedy.

8. Force Majeure

Article 6:75 of the Dutch Civil Code contains a provision for Force Majeure. It provides for a legal excuse for a non-performance if the non-performance was beyond the control of the party and not within his sphere of risk.

"Een tekortkoming kan de schuldenaar niet worden toegerekend, indien zij niet is te wijten aan zijn schuld, noch krachtens wet, rechtshandeling of in het verkeer geldende opvattingen voor zijn rekening komt."

"A non-performance cannot be attributed to the non-performing party if he is not to blame for it nor accountable for it by virtue of law, a juridical act or generally accepted principles."

Parties can refer to article 6:75 of the Code Civil or draw up a provision themselves. They can include specific circumstances as 'Force Majeure' or decide on a term for termination of the non-performing party.

Example:

If the performance by either Party of any of its obligations under this agreement (except a payment obligation) is delayed or prevented by circumstances, not reasonably foreseeable at the time of signing this agreement and beyond its reasonable control, that Party will not be in breach of this agreement because of that delay in performance. The Party concerned will notify the other Parties in writing without undue delay, describing the Force Majeure event(s), its anticipated duration and use of reasonable efforts to resume performance as soon as possible. However, if the delay in performance is more than [•] months, the other Parties may terminate this agreement with immediate effect by giving written Notice to the other Party.

9. Financial provisions

The Lead Institute is responsible for making the Funding and Co-funding available to the Parties that are entitled to it according to the Project Budget. Please take into account that the receipt of the funds is e.g. conditional on the approval of KWF Kankerbestrijding of the reporting of the scientific progress of the Project and other conditions mentioned in the Terms and Conditions.

Example:

The Lead Institute will make the Funding and Co-funding available for the Project upon receipt from KWF Kankerbestrijding and Co-funders.

Parties may also include a provision with regard to the justification of the costs.

Example:

Each Party is responsible for justifying its costs in accordance with generally accepted accounting and management principles and practices.

Each Party will be refunded based on actual and duly justified costs.

10. Project Budget

It is important to draw up a Project Budget including a payment schedule for the Funding and Co-funding so that it is clear when the resources are available and when the Lead Institute should make which amount of the funds available to the Parties that are entitled to it. Please also indicate how payments will be transferred, to what account and who is the financial contact. Make sure it is clear whether payments will be up-front or based on actual costs made.

Example:

The Lead Institute will make the Funding and Co-funding available for the Project in accordance with the Project Budget in Appendix [.]

Please note that the model of the Project Budget is part of this Consortium Agreement Model and is provided by KWF Kankerbestrijding without any warranty or representation. The use of this document is at the user's own risk and does not release the user from his own responsibilities towards drafting a sound Project Budget schedule to be approved by KWF Kankerbestrijding.

11. Liabilities of the Parties towards each other

Research collaboration agreements typically contain a 'fit for purpose' provision. This provision should include the specific reason why the material, information or advice made available under this agreement is made available 'as is', meaning without any warranty or representation (factual statements). In case of a research collaboration, the reason would be the experimental nature of the work done under the Project.

Example

Any material, information or advice, including Confidential Information, Background IPR and Results, made available for the Project under this agreement, are made available "as is", and each Party understands and agrees that such material, information or advice is experimental in nature and is made available without any warranty and representation, express or implied, including any implied warranty as to the merchantability, satisfactory quality or fitness for any particular purpose, or, except as expressly provided for herein, any warranty that the use of the same will not infringe or violate any patent or other proprietary rights of any Party.

The recipient Party is solely responsible for the use of material, information or advice, including Confidential Information, Background IPR and Results, made available by another Party for the Project under this agreement, and for the reliance by the recipient Party on any Background IPR or Results, and for his reliance on advice or information given in connection with that Background IPR or Results

The maximum liability of a Party under this agreement or otherwise in connection with this Project will not exceed [] Euro.

12. Results

KWF Kankerbestrijding will assess the provisions regarding Results on its conformity with the Terms and Conditions including the Grant Decision pertaining to the grant of the Funding for the Project.

If valorisation and (future) exploitation are the purpose of this collaboration then this should be made explicit in this section of the agreement (and the “whereas section”). Parties should include provisions regarding a patent application and management strategy and provisions regarding reasonable efforts towards valorisation and exploitation. This can also include a provision stipulating the right of Parties to seek protection of valuable Results in case the owner of the Results fails to do so.

a. Ownership of Results

The default situation is that the legal entity that employs the scientist that generated the Results is entitled to the rights to these Results.

Example:

Results shall be owned by the Party whose employee(s) generated such Results, or on whose behalf such Results have been generated.

b. Joint ownership of Results

Joint ownership arises by Dutch law when the Results are jointly developed by more than one Participating Organisation and their respective contribution to the final Result cannot be ascertained, or the Result is by nature indivisible.

For Results that do not lead to joint ownership by law, Parties need to make contractual arrangements.

Example:

Two or more Parties shall own Results jointly if:

- a. *they have jointly generated them; and*
- b. *it is not possible to:*
 - *establish the respective contribution of each Party; or*
 - *separate them for the purpose of applying for, obtaining or maintaining their protection.*

The Results will be jointly owned by the Parties in accordance with their relative contribution to the Results.

Parties may also apply a contractual arrangement such as the above to Results generated by one of the Parties.

c. Use of the Results

For implementation of the Project

The default situation is that Parties grant one another access to their Results on a non-exclusive, royalty free basis for the purpose and the term of the Consortium Agreement. However, Parties are free to negotiate different terms and conditions or even draw up a separate licence agreement. In most cases it will not be allowed to grant a sub-licence of another Party's Results to a third party. Parties can decide to qualify each other's Affiliates as not being a third party.

For exploitation of Results

If a Party wishes to have access to another Parties Results for Dissemination and Implementation purposes, this will need to be negotiated separately. The Consortium Agreement may include a provision that Parties will negotiate such a licence on fair and reasonable conditions.

d. Use of the Results by Affiliates

Whether or not Parties will allow Affiliates of other Parties to have access to their Background IPR or their Results has to do with 'control'. Especially when it concerns valuable knowledge (patentable or not), it can be of strategic importance to limit the access to it.

The Parties have several options regarding access for Affiliates:

1. An unconditional 'yes';
2. A conditional 'yes'. The Party that wants to give its Affiliates access to another Party's Background IPR or Results needs the prior written approval of that Party. Fair and reasonable compensation can be a condition for the approval of such request;
3. Pre-approved Affiliates are listed in a Appendix attached to the Consortium Agreement and the conditions for access are inserted in the body of the agreement;
4. No.

This requires a definition of the term 'affiliate'

Example:

*An **Affiliate** of a Party means any one or more legal entities, which is (are) directly or indirectly: (i) owned or controlled by a Party, (ii) owning or controlling a Party, or (iii) owned or controlled by the legal entity owning or controlling a Party, at the relevant time. For the purposes of this definition, a legal entity shall be deemed to own and/or to control another entity if more than 50% (fifty per cent) of the voting stock of the latter business entity, ordinarily entitled to vote in the election of directors (or, if there is no such stock, more than 50% (fifty per cent) of the ownership of or control in the latter legal entity) is held by and consolidated in the annual accounts of the owning and/or controlling legal entity. Common Control through government does not, in itself, create Affiliate status.*

e. Transfer of Results

The 'owner' of the Results can transfer the rights to the Results to one of the Participating Organisations or to a third party. If a knowledge institute transfers its rights to Results, KWF Kankerbestrijding requires this transfer to be subject to a non-exclusive, perpetual, fully paid up, worldwide, irrevocable licence for non-commercial research, educational purposes and (if applicable) normal patient care.

Example:

If a knowledge institute transfers its rights to Results, this transfer to the Results will be subject to a non-exclusive, perpetual, fully paid up, worldwide, irrevocable licence for non-commercial research, educational purposes and (if applicable) normal patient care.

Example:

Transfer of the rights to Results for commercial use or exploitation must always be negotiated at arm's lengths terms and on market conditions.

The Parties can decide to give the Party that made the Background IPR available for the Project a first option right to negotiate an assignment of the Non-Severable Improvement of such Background IPR.

Example:

Non-Severable Improvement

Results generated by any Party during the performance of the Work under the terms and conditions of this agreement that cannot be used without infringing the Background IPR of another Party.

When a Party transfers its right to Results, the transfer will not affect the rights of the other Parties in relation to these Results.

13. Access to Background IPR

The default situation is that a Party will grant access to its Background IPR to all Parties. However, a Party may decide to only grant access to a Party that “needs” the Background IPR 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 IPR or can be excluded.

Access to Background IPR of another Party for exploitation of one’s own Results after the term of the agreement will be negotiated separately. Parties can include a provision in the Consortium Agreement that the owner of the Background IPR will negotiate with the owner of the Results on fair and reasonable conditions. The licence can be limited to a specific “field of use” or territory.

Example:

Each Party grants the other Parties a royalty-free, non-exclusive licence to use its Background IPR for the term of the agreement and to the extent Needed for the execution of the Project.

No Party may grant any sub-licence to another Party’s Background IPR without the prior written permission of that Party.

Please note that this provision requires a definition of “Needed”.³

Example:

Needed means:

The licence as stipulated in article [•] of this agreement is Needed if, without the grant of this licence, carrying out the recipient Parties share of the Project Proposal would be impossible, significantly delayed, or require significant additional financial or human resources.

14. Dissemination and Implementation

It is mandatory for each Party to give Notice to the Consortium in case of Dissemination and Implementation. The default arrangement is “Assumed permission”. If the publishing Party does not receive a written objection from the reviewing Party within [30]/[45]/[60]/[90]/[120] days of submission of notification of publication then permission to publish will be deemed to have been given. The Dissemination and Implementation should not exceed a total period of one hundred twenty (120) days to be postponed, counting from the planned date of Dissemination and Implementation, this excludes Confidential Information (see clause15).

³ DESCA- Horizon 2020 Model Consortium Agreement (www.DESCA-2020.eu)

Example

1. A Party wishing to publish in written form, oral presentation or make public in any other form, information relating to the Background IPR, Results or any other information regarding the Project –confidential or not- will submit in writing to the Project Leader the intended publication 45 days before the intended publication date or before the date of submission for disclosure to review the publication.
2. The intended publication will clearly state the intended publication date.
3. The Project Leader will promptly make the intended publication available to the other Parties.
4. The intended publication is Confidential Information and as such protected in the manner this agreement provides for.
5. The Parties will have 45 days to review the intended publication.
6. The Parties can, by giving formal notice to the Project Leader, raise an objection with regard to the inclusion of their Confidential Information or may request a delay for a maximum of 120 days after receipt of the formal notice by the Project Leader, in order to seek patent or similar protection for the Results that are proposed to be published.
7. The publishing Party will remove any Confidential Information.

15. Confidentiality and non-use

Except as expressly provided in this Article 15, or otherwise agreed in writing by the Parties, the Parties agree that (a) each Party shall not disclose to any third party, and shall keep in confidence, all Confidential Information (e.g. preparatory information, Project Proposal, Background IPR and Results) of the other Party, using the same degree of care with which it maintains the confidentiality of its own Confidential Information, but in all cases with no less than a reasonable degree of care and (b) each Party may use the other Party's Confidential Information only to perform its obligations or exercise its rights under this Agreement.

16. Survival of rights and obligations

Parties may want certain rights or obligations (e.g. confidentiality obligations, access rights or Dissemination and Implementation) to continue after the agreement terminates. Use one clause to list the provisions which will survive termination of the agreement.

Example:

Clauses [• and •] will survive the completion or termination of the Project, the expiry of this agreement, or the withdrawal of any Party for any reason and will continue in force indefinitely.

17. Applicable law

This Consortium Agreement Model is based on (the principles of) the Dutch Civil Code and governed by Dutch law.

Example:

This Consortium Agreement is governed by Dutch law.

18. Inconsistencies

The Parties should:

1. Determine the hierarchy between the Terms and Conditions and the Consortium Agreement. KWF Kankerbestrijding can only approve consortium agreements that let the Terms and Conditions take precedence.

Example:

In case of an ambiguity or inconsistency between the Terms and Conditions including the Grant Decision on one hand and this agreement on the other hand, the Terms and Conditions including the Grant Decision will take precedence of this agreement.

2. Determine the hierarchy between the body of the Consortium Agreement and its Appendices.

Example:

In case of conflicts between the Appendices and the core text of this agreement, the core text will take precedence of the Appendices, with the exception of the Appendix containing the Terms and Conditions and the Grant Decision.

19. Notices

If the Consortium Agreement contains provisions with regard to the duty to notify (e.g. in case of a Participating Organisations' intent to transfer its Results to a third party), then a list of up to date addresses needs to be available to the Participating Organisations during the term of the Consortium Agreement.

Example:

*All notices ("**Notices**") given by one Party to another Party pursuant to this agreement will be in writing and will be delivered to the Contact Person of the other Party by (i) personal delivery, (ii) registered mail, (iii) registered courier, (iv) fax or (v) electronic mail, and in the latter two confirmed by mail, at the Party's address specified in this agreement as listed in [Appendix \[•\]](#).*

20. Assignment

It may prove to be necessary to assign the rights and obligations of a Participating Organisation to a third party (e.g. when the Project Leader moves to another university). Because the other Participating Organisations have carefully selected the initial collaborating partner, it is essential that an assignment to a third party is pre-approved by all Participating Organisations. For the assignment an Amendment is required and added to the Consortium Agreement. The Project Leader and Lead Institute are compulsory to submit the Amendment to KWF Kankerbestrijding. The Amendment will be assessed on its conformity with the Terms and Conditions. Please consider the (financial) implications in case KWF Kankerbestrijding does not consent with the Amendment.

Example:

Except as specifically provided for in this agreement, the rights and obligations arising from this agreement shall not be assigned to third parties, other than Affiliates, without the prior written approval of the other Parties.

If the Parties have not defined their affiliates as third parties, the reference to affiliates can be removed from this provision.

Example:

Except as specifically provided for in this agreement, the rights and obligations arising from this agreement shall not be assigned to third parties, without the prior written approval of the other Parties.

Parties can opt to specify when the exception applies.

Example:

Except as set out in article [•] of this agreement (Assignment of Results), no rights or obligations of the Parties arising from this agreement may be assigned or transferred, in whole or in part, to any third party [, other than to Affiliated Entities,] without the other Parties' prior formal approval.

21. Amendment

A Consortium evolves during the term of the Project. It is not unlikely that a Participating Organisation will be added to the Consortium or the Project Proposal needs to be adjusted. This will require an Amendment. It is important to correctly date the Amendments and keep track of all the additional provisions, especially when they concern the rights and obligations with regard to Background IPR made available by the Participating Organisations for the purpose of the Project and the rights and obligations with regard to the Results.

Example:

Amendments and modifications to the text of this agreement requires a separate written agreement to be signed between all Parties.

If the Participating Organisations foresee multiple Amendments, then a template amendment can be added to the Consortium Agreement in one of the Appendices.

VI. Signatures

VII. Appendices

An Appendix typically refers to content that could also be inserted in the main body of the Consortium Agreement but (for practical reasons) is instead moved to the end. Referring to lengthy documents rather than inserting them provides more clarity and brevity in the main body of the agreement.

Parties can include a provision in the main body of the Consortium Agreement stipulating that the agreement consists of the main body and all its Appendices, but it will be more precise to refer to each specific Appendix in a relevant provision. That reference makes the Appendix part of the Consortium Agreement.

Example

The Parties will conduct the Project named ["xxx"], as outlined in [Appendix 1](#) to this agreement in accordance with the Terms and Conditions.

If multiple versions of a document have been exchanged between the Parties, Parties can opt to sign the final, attached version.

Recommended Appendices:

- I. The Project Proposal submitted to and approved by KWF Kankerbestrijding;
- II. List of Background IPR made available by the Parties for execution of the Project.
A description of the Background IPR and any relevant restrictions and encumbrances associated with the Background IPR;
- III. Terms and Conditions;
- IV. The Grant Decision;

- V. Project Budget (check the 'Model budget schedule' at <https://www.kwf.nl/onderzoek/poi/Pages/downloadpagina-poi.aspx>)
- VI. Identified Affiliated Entities;
- VII. Co-funding agreements;
- VIII. In case of a 1st Option Right include provisions for:
 - The identified Results
 - Start- and end date
 - Exclusive or non-exclusive (royalty free or cost-bearing)
 - Sublicensing allowed yes/no
 - Field of Use
 - Territory of Use
 - Payment (lump sum and/or percentage of turn-over)
 - Other payment terms
 - Indemnity
- IX. A list of Contact Persons and addresses for official Notices.