

Drafting a Consortium Agreement tailored to your project

Iasmina Cioroianu

Project Manager, Europa Media Non-profit

Project Coordination in Horizon Europe
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Content

- The Consortium Agreement – the basics
- Other legal agreements
- The Grant Agreement
- Short guide to DESCAs

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The Consortium Agreement – the basics

Consortium Agreement

The basics

Why do I need a CA?

When should it be made?

Who should sign it?

Who should prepare it?

Do you need a lawyer?



Consortium Agreement

What to include?

- **Definitions** (e.g. software, associated partners, consortium body, consortium plan, defaulting party...)
- **Responsibilities of parties involved** including third parties involved, CA breach conditions and procedures
- **Liability** towards each other, limitations, damage caused to third parties, force majeure
- **Governance structure** of the consortium, representation in meetings, decision making, voting rules, specific procedures for Consortium bodies, quality assurance
- **Financial provisions** distribution of financial contribution (pre-financing, interim payments), excess payments
- **Results & access rights** joint ownership, transfer of results, dissemination, use & accessibility of results, confidentiality provisions



2

**Other legal
agreements**

Other legal agreements

Previous agreements in your CA

- Technical and commercial specification
- Background of the partners
- Pre-existing intellectual property
- Expected results
- Ownership of the results
- Confidential information
- Linked third parties
- Project name – trademark issues

(Check at this stage if not done for the proposal)

Consider

(if you have them):

- MoU
- Letter of intent
- NDA
- Confidentiality agreement

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The Grant Agreement

Grant Agreement

= the highest level legally binding framework for project implementation

- Signed between the beneficiaries and the European Commission/ Executive Agency of the EC
- Establishes the main rights & obligations of participants towards the European Commission
- **General Model Grant Agreement (V1.1, Apr 15, 2022)**
- **Annotated Model Grant Agreement (Draft V1.0, Apr 1st, 2023)**
- **Grant Agreement Preparation (GAP) process ~ 3 months**
- GAP led by the Coordinator, with contribution from partners



Grant Agreement

What's inside?

Core Part

Data Sheet

a summary of the specific data of the grant agreement

Articles

grouped in six chapters

1. General Data
2. Participant
3. Grant
4. Reporting, payment and recoveries
5. Consequences of non-compliance, applicable law and dispute settlement forum
6. Specific rules Annex 5 & Standard time-limits after project end

Chapter 1 General (Articles 1-2)

Chapter 2 Action (Articles 3-4)

Chapter 3 Grant (Articles 5-6)

Chapter 4 Grant Implementation (Articles 7-26)

Chapter 5 Consequences of non-compliance (Articles 27-35)

Chapter 6 Final provisions (Articles 36-44)

Grant Agreement

What's inside?

Annex 5 Special Rules

- **Security** (Article 13)
- **Ethics** (i.e. research integrity) (Article 14)
- **Values** (i.e. gender mainstreaming) (Article 14)
- **IPR** (Article 16)
- **Communication, Dissemination, Open Science and Visibility** (Article 17)
- **Specific rules for carrying out the action** (Article 18)
 - recruitment and working conditions
 - specific rules for access to research infrastructure actions
 - specific rules for PCP and PPI procurements
 - specific rules for co-funded partnerships
 - specific rules for ERC actions
 - specific rules for EIT-KIC actions
 - specific rules for MSCA actions
 - specific rules for EIC actions

Issues in the GA

How to include into your CA?

Grant Agreement	Consortium Agreement (DESCA)	Issues
Budgetary issues Art 5	Section 7 – Financial issues	e.g. reallocation, overspending
Implement the action - Non-compliance Art 11	Section 4 – Responsibilities of Parties	e.g. non-performing partner
Submission of deliverables Art 21	Section 6 – Governance structure	e.g. internal reporting, quality assurance
Reporting Art 21	Section 6 – Governance structure	e.g. reporting procedure
Identify payment schedule Art 22	Section 7 – Financial issues	e.g. advance payment
IPR issues Art 16	Section 8 – Results Section 9 – Access Rights	e.g. background, foreground, ownership, what is „needed” for implementation or exploitation

Action implementation

Non-compliance Art 11 (old 7)

SECTION 2 RULES FOR CARRYING OUT THE ACTION

ARTICLE 11 — PROPER IMPLEMENTATION OF THE ACTION

11.1 Obligation to properly implement the action

The beneficiaries must implement the action as described in Annex 1 and in compliance with the provisions of the Agreement, the call conditions and all legal obligations under applicable EU, international and national law.

11.2 Consequences of non-compliance

If a beneficiary breaches any of its obligations under this Article, the grant may be reduced (see Article 28).

Such breaches may also lead to other measures described in Chapter 5.

Consortium Agreement

How to make sure that one non-performing partner does not fail the project and makes all other partners work a lot more and/or pay back the EU funding?



4

Short guide to DESCAs

DESCA

Model Consortium Agreement

- Most widespread model CA (now updated for Horizon Europe)
- The revised model for HE takes into account the new requirements and experiences from past projects
- DESCA is developed by ANRT, EARTO, KoWi, LERU, VTT, ZENIT, Fraunhofer, Helmholtz Association
- Simple and comprehensive structure, adapted to project management, with guidance notes and optional clauses for flexibility
- DESCA suits universities, research organizations, but can be used in business-oriented projects as well

💡 ~ 80% of organizations participating in H2020 have used DESCA.

The working group provides this model Consortium Agreement as draft without assuming any warranty or responsibility. The use of the text in total or in part takes place on the users own risk and does not release users from legal examination to cover their interests and protect their rights.



for
Horizon Europe

Version 1.1, November 2022

Short guide to DESCA

The contents

- **Section 1** Definitions
- **Section 2** Purpose
- **Section 3** Entry into force, duration and termination
- **Section 4** Responsibilities of Parties
- **Section 5** Liability towards each other
- **Section 6** Governance structure
- **Section 7** Financial provisions
- **Section 8** Results
- **Section 9** Access Rights
- **Section 10** Non-disclosure of information
- **Section 11** Miscellaneous
- **Section 12** Signatures
- **Attachment 1** Background included
- **Attachment 2** Accession document
- **Attachment 3** List of Third Parties for simplified transfer according to Section 8.3.2
- **(Option) Attachment 4** Identified Affiliated Entities according to Section 9.5
- **(Option) Attachment 5** NDA for External Expert Advisory Board agreed under Section 6
- **Module GOV SP/LP**
- **Module IPR SC** Specific Software provisions

Updated terminology in HE DESCA

- Terminology aligned with new terminology of HE
- “Affiliated Entities” = the former “Linked Third Parties” (see MGA Article 2 Definitions)
- “Entities under the same control” defined in MGA Annex 5 (p. 101)
- “Participants” defined in MGA Article 2 Definitions
- “Other Participants” defined in MGA Article 9

Responsibilities of Parties

Section 4

4.1 General principles

Each Party undertakes:

- to take part in the efficient implementation of the Project, and to cooperate, perform and fulfil, promptly and on time
- act according to the obligations of the GA and CA in a manner of good faith as prescribed by Belgian law
- to notify promptly, any significant information, fact, problem or delay likely to affect the Project.
- provide all information reasonably required by a Consortium Body or by the Coordinator to carry out its tasks.

4.2 Breach

This section defines the situation and the procedures when the relevant Consortium Body declares a Party to be a Defaulting Party.



Responsibilities of Parties

Section 4.2 – the standard example

“In the event that the General Assembly identifies a breach by a Party of its obligations under this Consortium Agreement or the Grant Agreement (e.g. improper implementation of the Project), the Coordinator or, if the Coordinator is in breach of its obligations, the Party appointed by the General Assembly, will give formal notice to such Party requiring that such breach will be remedied within 30 calendar days from the date of receipt of the written notice by the Party.

If such breach is substantial and is not remedied within that period or is not capable of remedy, the General Assembly may decide to declare the Party to be a Defaulting Party and to decide on the consequences thereof which may include termination of its participation.”



Responsibilities of Parties

Section 4

4.3 Involvement of third parties

A Party that enters into a subcontract or otherwise involves third parties (including but not limited to Affiliated Entities or other Participants) in the Project remains responsible for carrying out its relevant part of the Project and for such third party's compliance with the provisions of this Consortium Agreement and of the Grant Agreement.

4.4 Specific responsibilities regarding data protection

- Represents a minimum statement regarding GDPR
- When necessary, a separate agreement concerning data processing, data sharing and/or joint controlling should be made



Responsibilities of Parties

Section 4 – NEW article for LS

4.5 Specific responsibilities regarding reporting and implementation

- **Internal progress reports** – status of work packages
- **Proper implementation** – all partners must contribute to the completion of a WP, otherwise collaborate to amend the GA for that WP
- **Termination reports** – a leaving Party shall issue a termination report on the implemented and completed activities and share in the WPs
- **Consequences of non-compliance** – improper reporting or implementation may lead to a breach procedure (according to Section 4.2). Improper implementation can lead to liability (Section 5).



Liability towards each other

Section 5

5.1 No warranties

This section sets the base for the limitation of liability with regard to outputs (covering also the Results and Background) delivered by one Party to another Party.

5.2 Limitations of contractual liability

This section explains the basic limitations of contractual liability including the indirect damages and direct damages.

The Parties may choose what amount to set as the limitation of liability. It is usually either once or twice their project share.

5.3 Damage caused to third parties

Each Party shall be solely liable for any loss, damage or injury to third parties resulting from the performance of the Party.

5.4 Force Majeure (as defined in GA Art. 35)

No Party shall be considered to be in breach of the CA if it is prevented from fulfilling its obligations by Force Majeure. Relevant Consortium Bodies must be informed on time.

Optional article 5.5: Export control

An option for a new Section 5.5 has been added for consideration to be used for projects in which import or export control is relevant – see Regulation (EU) 2021/821

Liability towards each other

Section 5 – suggested LS additions

5.2 Limitations of contractual liability

Considering the form of the grant awarded by the Funding Authority (lump sum), a Party declared as a Defaulting Party in accordance with the appropriate provisions of this Consortium Agreement shall be liable to any other Party for loss of part of said grant.

For any remaining contractual liability, a Party's aggregate liability towards the other Parties collectively shall be limited to once the Party's share of the total costs of the Project as identified in Annex 2 of the Grant Agreement provided such damage was not caused by a wilful act or gross negligence.

Governance structure

Section 6

6.1 General structure

The organisational structure of the consortium shall comprise the following Consortium Bodies: **The General Assembly** is the decision-making body of the consortium. The Coordinator is the legal entity acting as the intermediary between the Parties and the Granting Authority. The Coordinator shall, in addition to its responsibilities as a Party, perform the tasks assigned to it as described in the Grant Agreement and this Consortium Agreement.

For Lump Sum

The **Work Package Leaders Group** is an assessment group of the Consortium without formal decision-making power. It shall assess the individual and overall implementation of the Project.

💡 DESCA provides you with a model governance structure for Medium and Large Projects, and for Small Projects.

Quality assurance tip

Add a reference to the Project Handbook.

Example: *“To ensure good management and monitoring of the project, the Coordinator will ask each Party to follow the communication, meeting and reporting procedures that will be circulated as part of the Deliverable D1.1, the Project Handbook. The deliverable will be validated and approved by the General Assembly.”*

Governance structure

Section 6

6.2 General operational procedures for all Consortium Bodies

- Representation in meetings
- Preparation and organization of meetings (convening meeting, notices, agendas, decisions without meetings)
- Voting rules and quorum
- Veto rights
- Minutes of the meetings

6.3 Specific operational procedures for the Consortium Bodies

- General Assembly (decisions on content, finances, IPR, evolution of consortium)
- Executive Board



Governance structure

Section 6 – LS additions

6.3.7 Decisions of the General Assembly

Content, finances and IPR

- Proposals for changes to Annexes 1 and 2 of the Grant Agreement to be agreed by the Granting Authority such as changes resulting from suggested reallocation of tasks and budget by the Work Package Leaders Group
- The percentage of work package completion per work package as well as per Party to be reported to the Granting Authority based on the assessment by the Work Package Leaders Group regarding the individual performance of single Parties in case of non-completion of work packages



Governance structure

Section 6

6.4 Coordinator

Introducing the responsibilities of the Coordinator

For Lump Sum

- preparing the meetings and preparing the agenda of Work Package Leaders Group meetings

6.5/6.6 External Expert Advisory Board (EEAB)

Explicit mandate for Coordinator to sign non-disclosure-agreement with the members of the External Expert Advisory Board on behalf of the consortium, [NDA](#) to be inserted as Annex.



Governance structure

Section 6 – NEW article for LS

6.5 Work Package Leaders Group

- **Members of the Work Package Leaders Group** = coordinator + WP leaders
- **Meetings**
- **Responsibilities** – keeping the project on track, evaluate suggestions of reallocation, make suggestions for amendments, assess reports, assess the status/completion of each WP, support coordinator in preparing meetings with the EC, support the coordinator in the termination report, suggest KPIs for determination of proper completion of WPs



Financial provisions

Section 7

7.1 General principles

7.1.1 Distribution of Financial Contribution

The financial contribution of the Granting Authority to the Project shall be distributed by the Coordinator according to: the Consortium Plan; the approval of reports by the Granting Authority, and the provisions of payment in Section 7.2. A Party shall be funded only for its tasks carried out in accordance with the Consortium Plan.

7.1.2 Justifying Costs

In accordance with its own usual accounting and management principles and practices, each Party shall be solely responsible for justifying its costs (and those of its Affiliated Entities, if any) (...)

7.1.3 Funding Principles

A Party that spends less than its allocated share of the budget as set out in the Consortium Plan or – in case of reimbursement via unit costs - implements less units than foreseen in the Consortium Plan will be funded in accordance with its units/actual duly justified eligible costs only. A Party that spends more than its allocated share of the budget as set out in the Consortium Plan will be funded only in respect of duly justified eligible costs up to an amount not exceeding that share.

Financial provisions

Section 7 – NEW articles for LS

7.1 General principles

7.1.2 Justifying Lump Sum Contributions

Each Party contributes with complete, reliable and true information to all reporting requirements regarding the completion of work packages and proper implementation. Moreover, adequate records and supporting documents must be provided by the Parties concerned upon request of the Granting Authority in line with the Grant Agreement. Each Party is solely liable for justifying its Lump Sum Contribution or share.

7.1.3 Funding Principles

Each Party is entitled to its Lump Sum Contribution as approved by the Granting Authority after completion of the respective work package. For work packages not completed at the end of the Project, the Coordinator distributes to each Party only the share of Lump Sum Contribution as approved by the Granting Authority at final payment.

Financial provisions

Section 7

7.1.4 Excess payments

A **Party** has received excess payment

a) if the payment received from the Coordinator exceeds the amount declared or

b) if a Party has received payments but, within the last year of the Project, its real Project costs fall significantly behind the costs it would be entitled to according to the Consortium Plan.

For Lump Sum

b) If the WP Leaders Group/Executive Board assessed that the performance of a Party regarding the completion of one or several work packages is significantly lower than foreseen in Annex 1 of the Grant Agreement and that the Party received more funding than approved by the Granting Authority.

Excess payment clause 7.1.4

- For cases of overpayment in which the Mutual Insurance Mechanism does not intervene because the money is not due to the Granting Authority
- From the Commission's point of view, the distribution of funding among partners is an internal matter to be solved within the Consortium
- Explicit contractual obligation to pay back money to the coordinator in case of overpayment
- Procedure to deal with cases of overpayment in which the Party is reluctant to pay back – The General Assembly decides on “Defaulting Party” status

Financial provisions

Section 7

7.1.5 Revenue (delete for Lump Sum)

In case a Party earns any revenue that is deductible from the total funding as set out in the Consortium Plan, the deduction is only directed toward the Party earning such revenue. (...)

7.1.6 Financial Consequences of the termination of the participation of a Party

A Party leaving the consortium shall refund to the Coordinator any payments it has received except the amount of contribution accepted by the Granting Authority or another contributor (...)

– A Defaulting Party should bear costs occurring to the other Parties who perform the leaving Party's tasks. The General Assembly should decide on a procedure regarding any additional costs not covered by the Defaulting Party or the Mutual Insurance Mechanism



Financial provisions

Section 7

7.1.6 Financial Consequences of the termination of the participation of a Party

For Lump Sum

A Party leaving the consortium shall refund to the Coordinator any payments it has received except the amount of Lump Sum Contributions accepted by the Granting Authority [or another contributor] at termination. After termination this Party is entitled to receive its Lump Sum Contribution as foreseen in Annex 2 of the Grant Agreement and approved by the Granting Authority at interim or final payment. The Coordinator will inform this Party accordingly upon payment of the final amount by the Granting Authority and distribute the amount due to the terminated Party.

In addition, a Defaulting Party shall, within the limits specified in Section 5.2 of this Consortium Agreement, bear any reasonable and justifiable additional costs occurring to the other Parties in order to perform the leaving Party's tasks as well as for additional efforts necessary to complete the respective work packages. The General Assembly should agree on a procedure regarding additional costs which are not covered by the Defaulting Party or the Mutual Insurance Mechanism.

Financial provisions

Section 7

7.2 Payments

7.2.1 Payments to Parties are the exclusive task of the Coordinator.

7.2.2 The transfer of the initial pre-financing, the additional pre-financings (if any) and interim payments to Parties will be handled in accordance with Article 22.1. and Article 7 of the Grant Agreement following this payment schedule:

You can select from different options:

- **Option 1** Funding of costs included in the Consortium Plan will be paid by the Coordinator to the Parties after receipt of payments from the Granting Authority in separate instalments as agreed below *example on next slide*
- **Option 2** Funding of costs included in the Consortium Plan will be paid by the Coordinator to the Parties after receipt of payments from the Granting Authority without undue delay and in conformity with the provisions of the Grant Agreement.

7.2.2

– The Coordinator is entitled to recover any payments paid to a Defaulting party except the costs already claimed by the Defaulting Party and accepted by the Granting Authority.

Financial provisions

7.2.2 Payment schedule – examples

The amount of the pre-financing will be defined in Art. 22.1 of the GA by the Granting Authority. It will be 85% of the maximum EC contribution. 5% of the maximum grant amount, will be transferred directly by the Granting Authority to the Mutual Insurance Mechanism. So, the actual transfer will be 80%. After receiving the Pre-financing from the Granting Authority, the Coordinator will transfer the Funding to the Parties in separate instalments as agreed below:

- **60 %** On receipt of the pre-financing
- **40 %** Later, after the Coordinator has received and assessed the technical and financial input for the first internal report (for the period M1-M9) from Parties and if the reported data proves the demand for payment.

If the demand for payment occurs earlier than after 9 months, starting from the first month of the project, respective Party can provide the internal report to the Coordinator and receive the payment earlier than after 9 months.

For Lump Sum

The transfer of the initial pre-financing, the additional pre-financings (if any) and interim payments to Parties will be handled in accordance with Article 22.1. and Article 7 of the Grant Agreement following this payment schedule:

Funding of costs included in the Consortium Plan will be paid by the Coordinator to the Parties after receipt of payments from the Granting Authority in separate instalments as agreed below:

- **75 %** On receipt of the pre-financing
- **Remaining 25 % of the pre-financing:** At the end of month 18 of the project, upon achievement of the Milestone M4 – e-solutions running.

 **Another example in the DESCA model:** cut down to 30%-15%-15%-15%...

Results

Section 8

8.1 Ownership of results

Results are owned by the Party that generates them.

8.2 Joint ownership

Option 1

- each of the joint owners shall be entitled to use their jointly owned Results for non-commercial research and teaching activities on a royalty-free basis, and without requiring the prior consent of the other joint owner(s).
- each of the joint owners shall be entitled to otherwise Exploit the jointly owned Results and to grant non-exclusive licenses to third parties (without any right to sub-license), if the other joint owners are given: (a) at least 45 calendar days advance notice; and (b) fair and reasonable compensation.

The joint owners shall agree on all protection measures and the division of related cost in advance.



Results

Section 8

8.2 Joint ownership

Option 2

- In case of joint ownership, each of the joint owners shall be entitled to Exploit the joint Results as it sees fit, and to grant non-exclusive licenses, without obtaining any consent from, paying compensation to, or otherwise accounting to any other joint owner, unless otherwise agreed between the joint owners.
- The joint owners shall agree on all protection measures and the division of related cost in advance.

8.2 Joint ownership

- Addition of teaching activities for the use of jointly owned Results
- Elucidations address non-commercial research and aspects to be taken into account if the consortium wishes to define it.

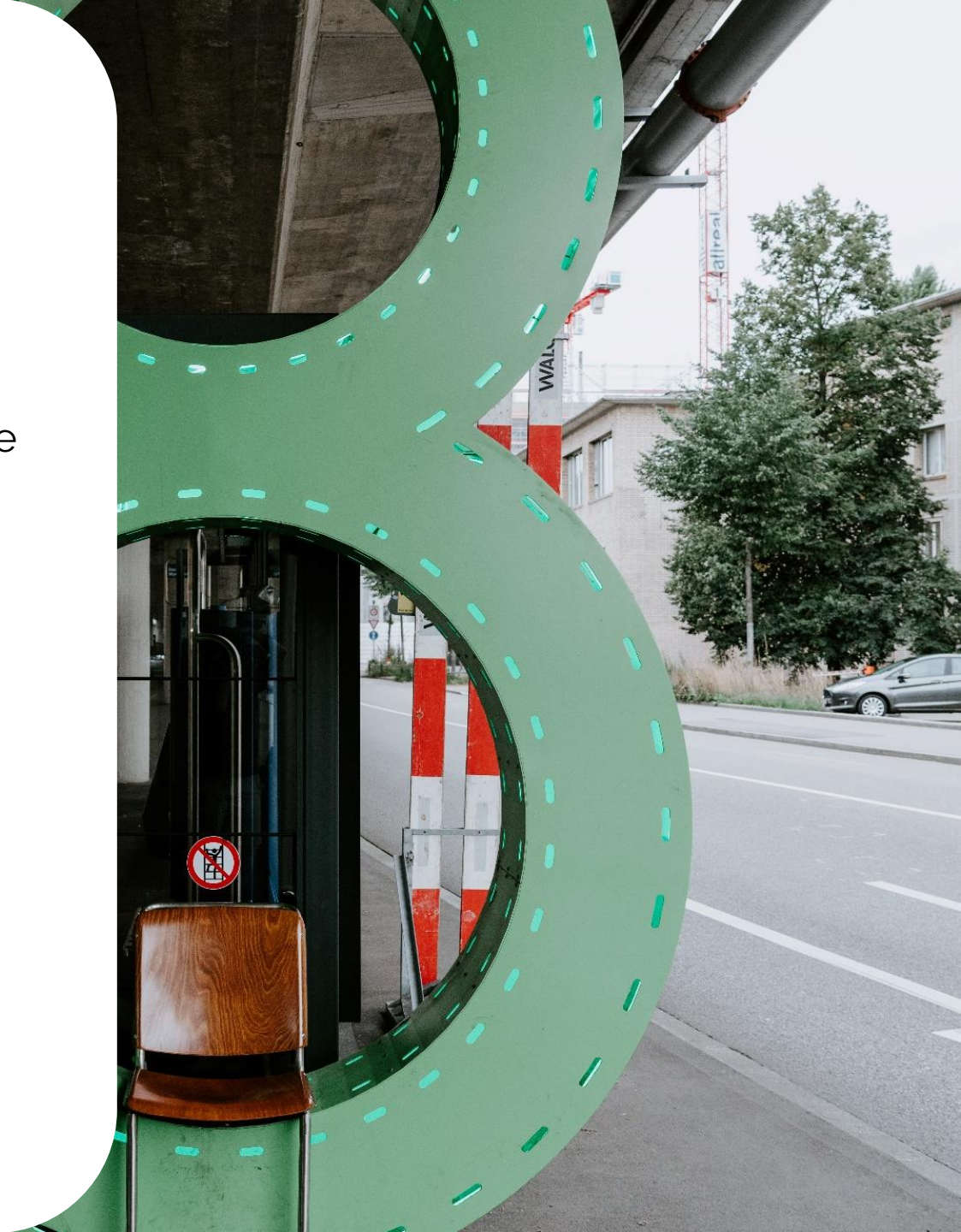
Note on ownership regime

Section 8.1 Ownership of results

Results are owned by the Party that generates them. In particular:

- For **Results in the form of software**, ownership is granted to the Party (or Parties) who designs (design) the software and writes (write) the codes.
- For **Results in the form of database**, ownership is granted to the Party (or Parties) who provides the data.

Improvements exclusively made by one Party to its Background in the framework of the Project shall remain the property of this Party.



Results

Section 8

8.3 Transfer of results

- Each Party may transfer ownership of its own Results.
- Conditions for transferring the results to specific third parties (identified in Attachment 3).
- Rights of the other Parties should not be affected by such transfer.



Results

Section 8

8.4 Dissemination of own (including jointly owned) results

- The Consortium Agreement should set out rules how results will be identified, reported, protected, disseminated and exploited.
- You should put in place a process to identify valuable results.
- Parties may have different interests as regards the dissemination of results (public vs confidential).
- The rules should ensure that decisions on disseminating the results takes account of the interests of all Parties (not resulting delay in dissemination – prior notice, rejection of request).
- Objection protocol
- Disseminating other Party's unpublished results or background requires prior approval.

8.4.2 Dissemination of own (including jointly owned) Results

- Addition of a new objection ground about Confidential Information in 8.4.2.2
- Elucidations address the possibility of making a distinction between different forms of dissemination with different timeframes.

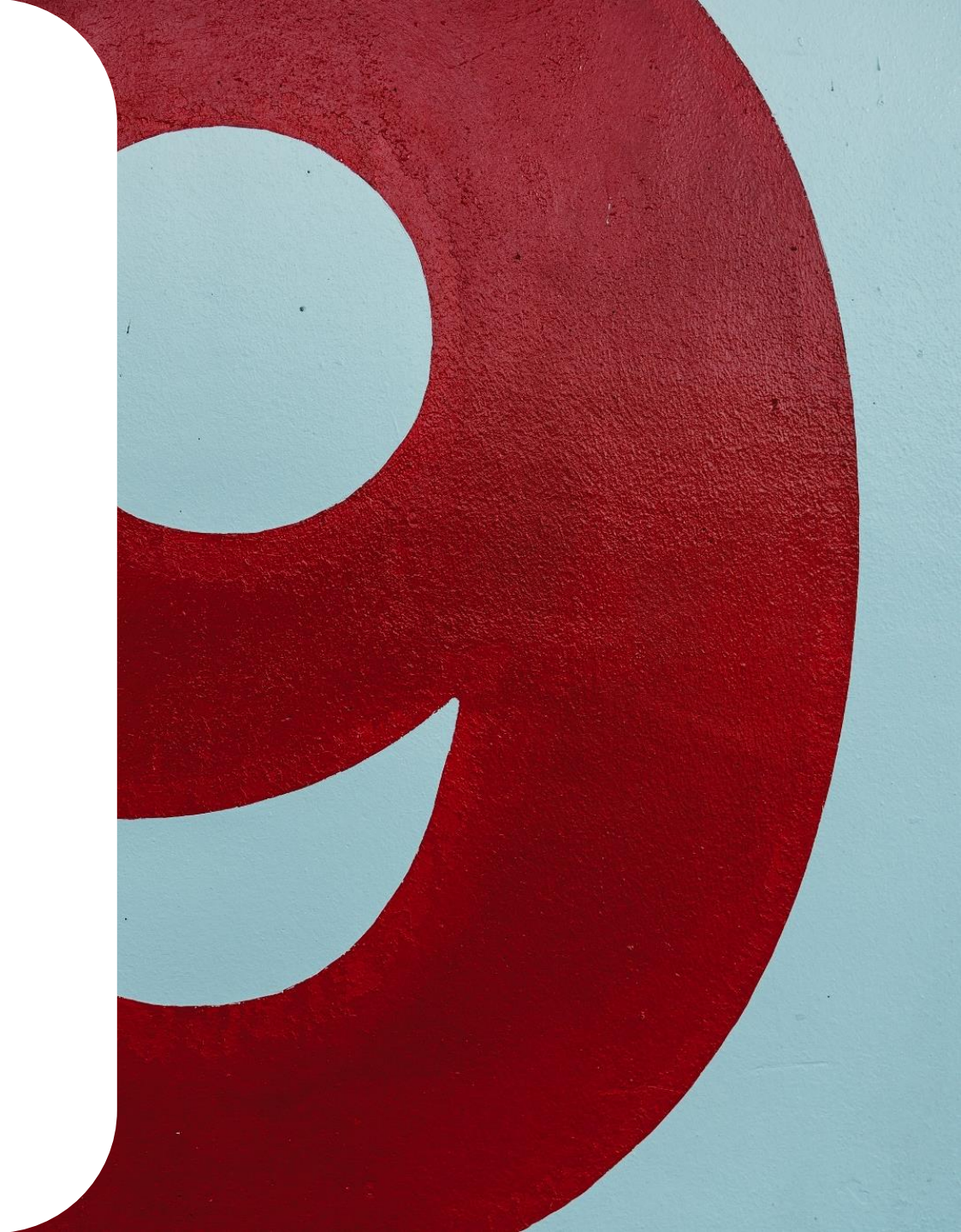
Access Rights

Section 9

9.1 Background included

9.1.1 In Attachment 1, the Parties have identified and agreed on the Background for the Project and have also, where relevant, informed each other that Access to specific Background is subject to legal restrictions or limits. Anything not identified in Attachment 1 shall not be the object of Access Right obligations regarding Background.

9.1.2 Any Party may add additional Background to Attachment 1 during the Project provided they give written notice to the other Parties. However, approval of the General Assembly is needed should a Party wish to modify or withdraw its Background in Attachment 1.



Access Rights

Section 9

9.2 General Principles

9.2.1 Each Party shall implement its tasks in accordance with the Consortium Plan and shall bear sole responsibility for ensuring that its acts within the Project do not knowingly infringe third party property rights.

9.2.2 Any Access Rights granted exclude any rights to sublicense unless expressly stated otherwise.

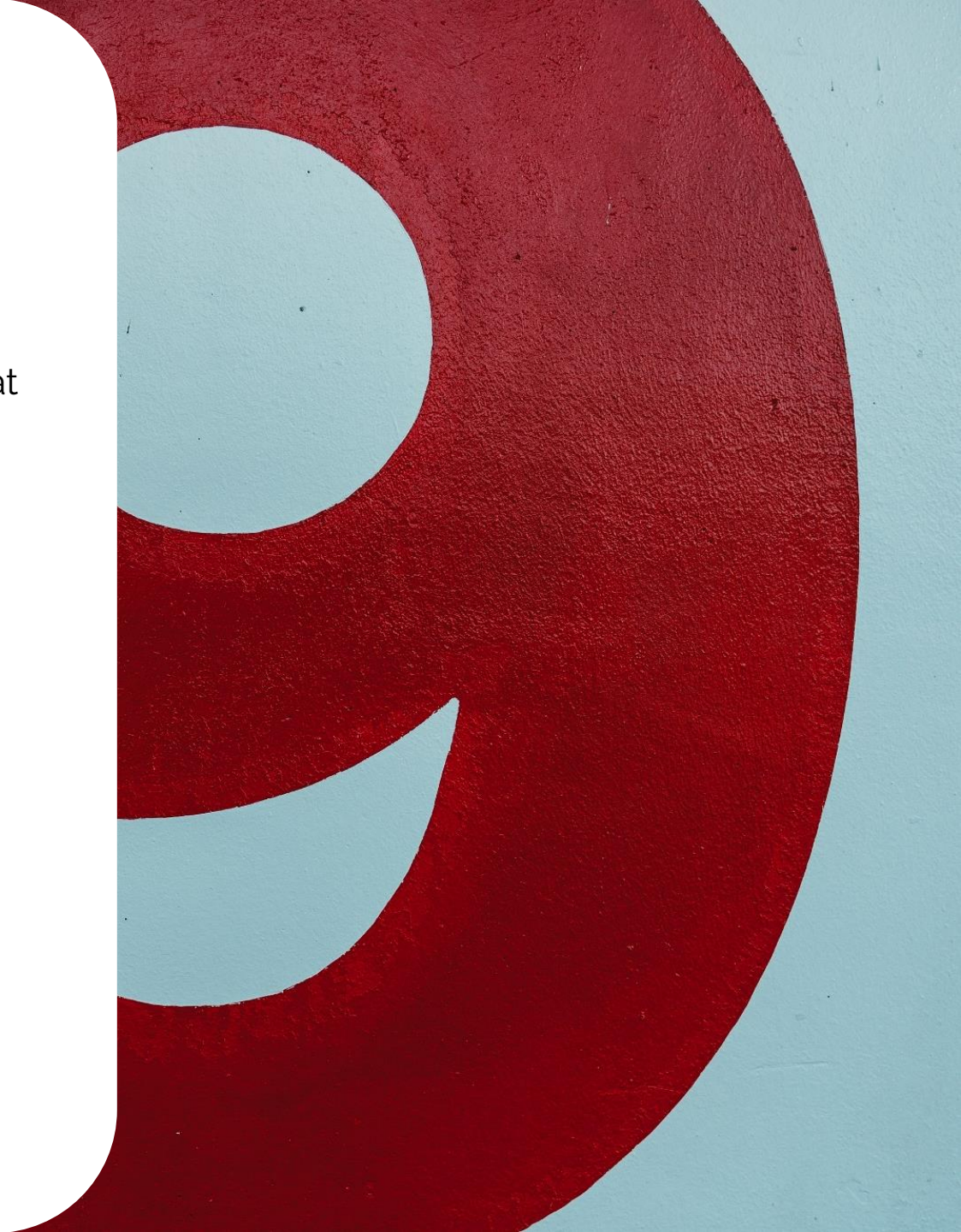
9.2.3 Access Rights shall be free of any administrative transfer costs.

9.2.4 Access Rights are granted on a non-exclusive basis.

9.2.5 Results and Background shall be used only for the purposes for which Access Rights to it have been granted.

9.2.6 All requests for Access Rights shall be made in writing. The granting of Access Rights may be made conditional on the acceptance of specific conditions aimed at ensuring that these rights will be used only for the intended purpose and that appropriate confidentiality obligations are in place.

9.2.7 The requesting Party must show that the Access Rights are Needed.



Access Rights

Section 9

9.3 Access Rights for implementation

Access Rights to Results and Background Needed for the performance of the own work of a Party under the Project shall be granted on a royalty-free basis, unless otherwise agreed for Background in Attachment 1.

9.4 Access Rights for Exploitation

9.4.1 Access Rights to Results

- Option 1) Access Rights to Results if Needed for Exploitation of a Party's own Results shall be granted on Fair and Reasonable conditions. Access rights to Results for internal research and for teaching activities shall be granted on a royalty-free basis.
- Option 2) Access Rights to Results if Needed for Exploitation of a Party's own Results shall be granted on a royalty-free basis.

9.4.2 Access Rights to Background if Needed for Exploitation of a Party's own Results, shall be granted on Fair and Reasonable conditions.

9.4.3 A request for Access Rights may be made up to 12 months after the end of the Project or, in the case of Section 9.7.2.1.2, after the termination of the requesting Party's participation in the Project.

9.4.1 Access Rights for Exploitation

– Teaching purpose added in Access Rights to Results for internal research in 9.4.1

– Clarification on Access Rights to Background in the elucidations (9.4.2), to the effect that exploitation can be any activity outside of Implementation of the Action, including research on behalf of a third party, linked to the EC Model Grant Agreement

Access Rights

Section 9

9.5 Access Rights for entities under the same control (if applicable)

9.6 Additional Access Rights

Option 1 For the avoidance of doubt any grant of Access Rights not covered by the Grant Agreement or this Consortium Agreement shall be at the absolute discretion of the owning Party and subject to such terms and conditions as may be agreed between the owning and receiving Parties.

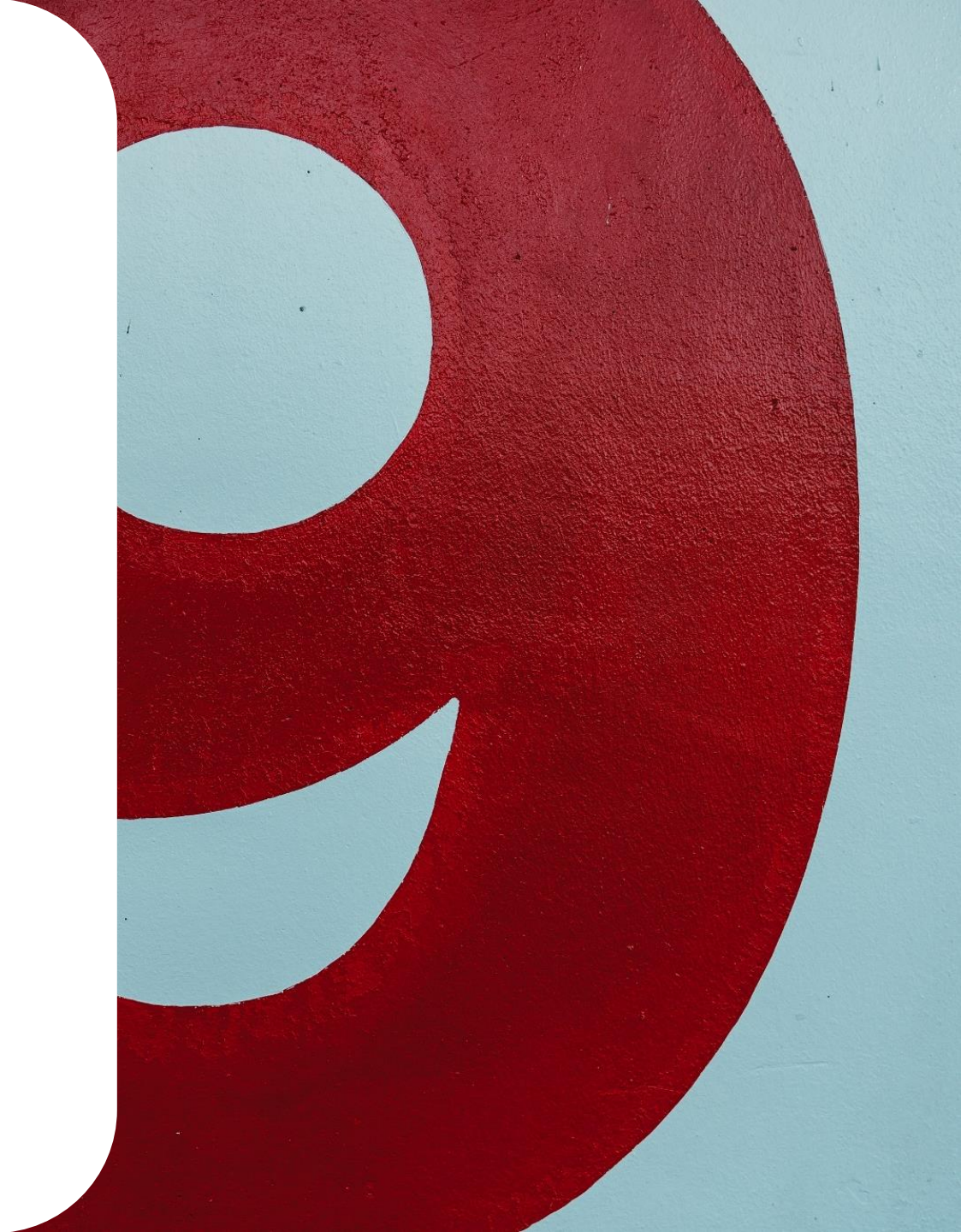
Option 2 The Parties agree to negotiate in good faith any additional Access Rights to Results as might be asked for by any Party, upon adequate financial conditions to be agreed.

9.7 Access Rights for Parties entering or leaving the consortium

- Provisions for defaulting and non-defaulting Parties

9.8 Specific Provisions for Access Rights to Software

For the avoidance of doubt, the general provisions for Access Rights provided for in this Section 9 are applicable also to Software.



Access rights

Section 9

**ACCESS RIGHTS TO
BACKGROUND**

**ACCESS RIGHTS TO RESULTS OF THE
PROJECT**

**FOR CARRYING
OUT THE
PROJECT**

**IF A PARTICIPANT NEEDS THEM FOR CARRYING OUT ITS OWN
TASKS IN THE PROJECT**

ROYALTY-FREE
UNLESS OTHERWISE AGREED

ROYALTY-FREE

IN ATTACHMENT 1
(BACKGROUND INCLUDED)

**FOR
EXPLOITATION**

IF A PARTICIPANT NEEDS THEM FOR EXPLOITING ITS OWN RESULTS

**FAIR AND REASONABLE
CONDITIONS**

OPTION 1: FAIR AND REASONABLE
CONDITIONS; INTERNAL RESEARCH
ROYALTY-FREE

OPTION 2: ROYALTY-FREE

Access rights

Time conditions

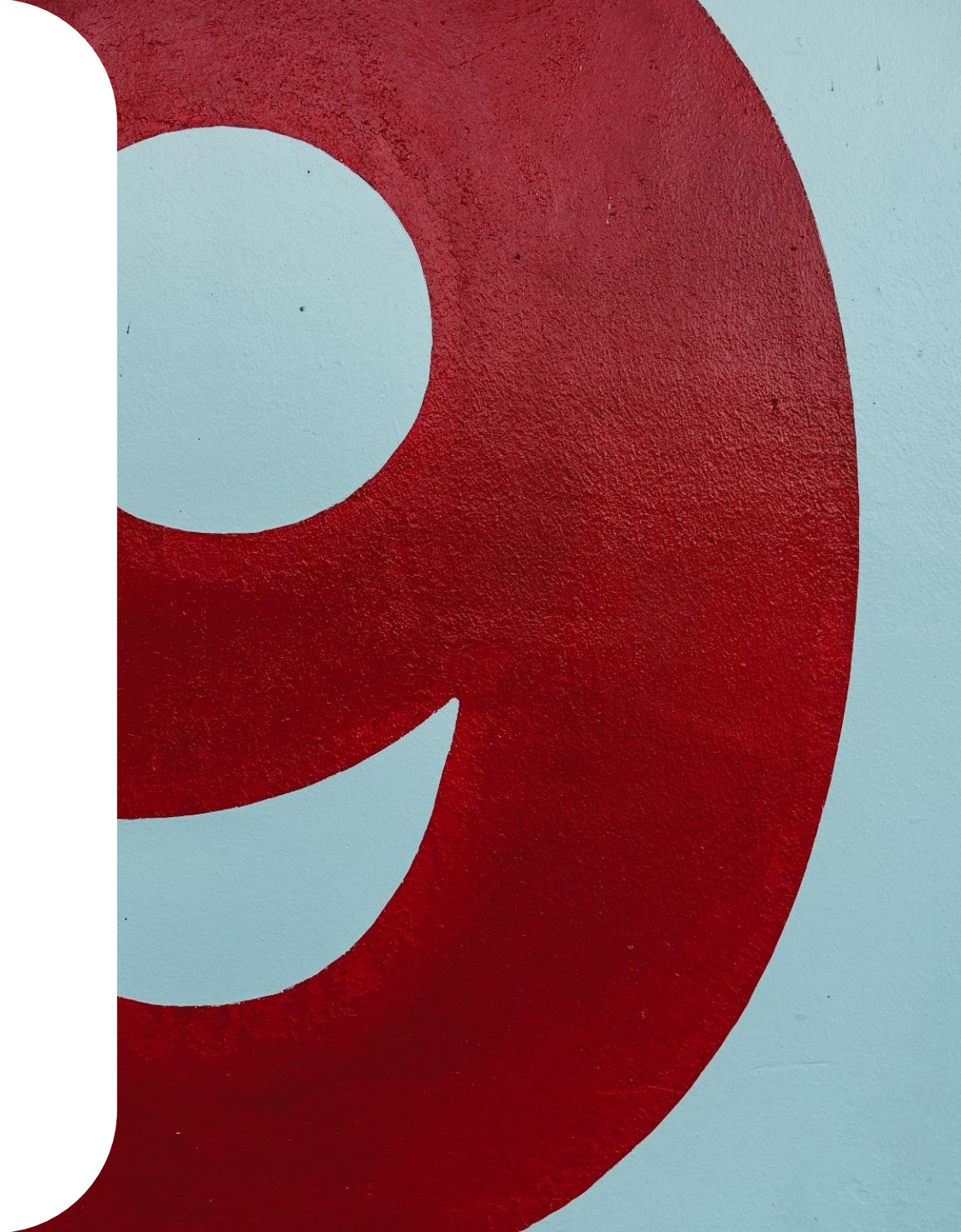
'Fair and reasonable conditions' means appropriate conditions, including possible financial terms or royalty-free conditions, taking into account the specific circumstances of the request for access, for example the actual or potential value of the results or background to which access is requested and/or the scope, duration or other characteristics of the exploitation envisaged.

**FOR CARRYING
OUT THE
PROJECT**

**ANY TIME
DURING PROJECT
IMPLEMENTATION**

**FOR
EXPLOITATION**

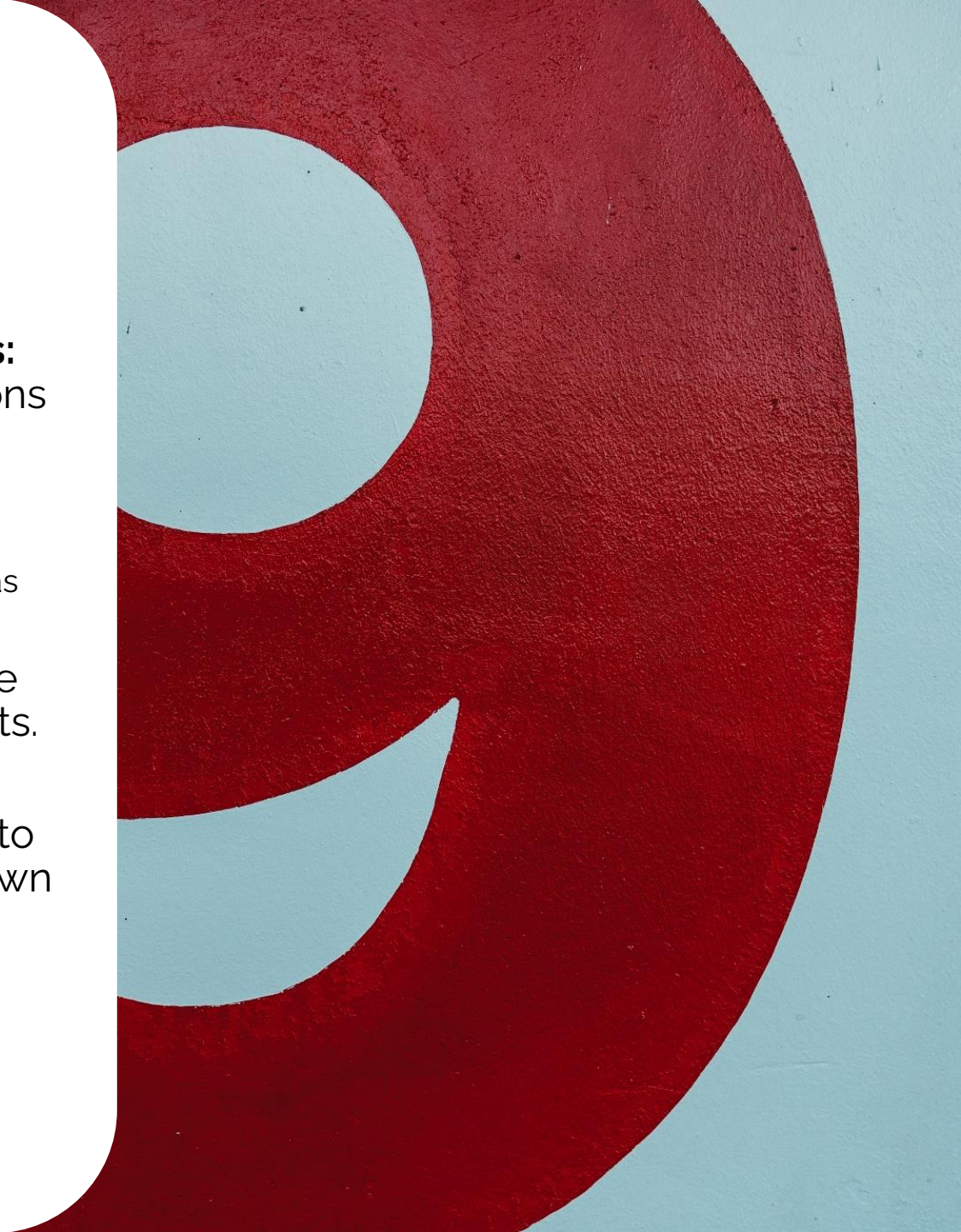
**Unless agreed otherwise,
up to one year after the period
set out in Art. 3 GA)**



Access rights

IP due diligence

- **list the IP assets:** preparation of an IP inventory.
- **identify the ownership of potential background assets:** clarifying the owner of IP assets. There are several options when it comes to the ownership regime of background:
 - (i) the owner of the asset can be the beneficiary
 - (ii) the beneficiary can be one of the co-owners or
 - (iii) the asset may be owned by a third party, but the beneficiary has the right to use the asset (e.g. as a licensee).
- **find out restrictions on use (if any):** checking if there are any contractual or legal limitations on use of the IP assets.
- **define the relevance of the assets:** deciding which background assets are “needed” for other beneficiaries to carry out their project tasks, and when exploiting their own project results.
- **check if any IP protection measure should be taken:** taking possible IP protection measures for the listed IP assets.



Access rights

Access to Background

To list:

- Background you bring into the project
- Owner(s) of the background
- Access rights for implementation
- Access rights for exploitation

💡 This list is always a **positive list**. Do not list background you will not give access to.

Background	Owner of the Background	Access Rights - Specific limitations and/or conditions for implementation (Article 25.2)	Access Rights - Specific limitations and/or conditions for exploitation (Article 25.3)
DE Patent No. 123456, title [...] filed on 7/1/2010	Beneficiary-1	Free of charge to all beneficiaries	
European Patent No. 123456, title [...] filed on 25/3/2012	Third party X, exclusive licensee: Beneficiary-2	Shall only be used by Beneficiary-2 as being the exclusive licensee. Shall not be used by other beneficiaries.	
Database [...]	Beneficiary-1	Shall only be used by Beneficiary-1. No access rights for other beneficiaries.	Shall be used by Beneficiary-2 only within Spain, by Beneficiary-3 only within France.
Clinical results for application of [...], licensed from Third party Y	Third party Y, licensee: Beneficiary-3	Disclosed under NDA ²⁴ , any disclosure or use needs confidentiality provisions approved by the Third party Y and Beneficiary-3	Excluded
Source code for [...]	Beneficiary-4	Excluded	Excluded

Key takeaways

- Nothing can be agreed on until everyone agrees and you will not conflict with the GA (or the applicable law).
- Consider the conditions of the project and make sure you try to avoid certain risks with the help of the CA articles – tailor the DESCA.
- Make sure that joint ownership and other potential IPR conflicts – if relevant – are properly tackled at the proposal development stage already.



THANK YOU!

for your attention

Iasmina Cioroianu

iasmina.cioroianu@europamedia.org

europamediatrainings.com

info@europamediatrainings.com



@EuropaMedia