



ORIENT- NM

Organisation of the European Research Community on Nuclear Materials

A Coordination and Support Action in Preparation of a Co-Funded European Partnership on Nuclear Materials



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Work Package 3 – CEP structure and functioning: legal issues, resource needs and implementation

Deliverable D3.2:

Legal issues related to CEP NM - draft

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List of abbreviations

AC	Associated Country, a non-EU country that can participate under equivalent conditions as legal entities from the EU Member States, unless specific limitations or conditions are laid down in the work programme and/or call/topic text
Affiliated entity	(prev. "Linked third party") Entity that has a link with a beneficiary, in particular legal or capital link, which is neither limited to the project nor is established for the sole purpose of its implementation.
CA	Consortium Agreement
CEP	Co-funded or Co-programmed European Partnership
EC	European Commission
EJP	European Joint Programme
EU	European Union
GA	General Assembly
MB	Management Board
MS	Member State
SRA	Strategic Research Agenda
VP	Vision Paper
WP	Work-package

Introduction

This task of the ORIENT NM project will address all the most important legal issues for the CEP structure selected in T3.1 (see D 3.1.EJP/CEP structure), with emphasis on those that are specific for a CEP on nuclear materials. In particular, the potential participants at different levels of CEP (signatories and associates) are identified in WP1 and Task 3.1. Due to the nature of the organisations participating in the CEP, different legal issues are related to them, and these need to be solved. In particular, industrial partners, associations (such as EERA-JPNM or SNETP in the future), research and education organisations, as well as TSOs will have to be appropriately involved, with industry in many respects on the same footing as research organisations. The legal position of different CEP participants shall be clarified (how they can become part of it and how they can operate). This task shall propose legal solutions allowing all types of actors to become involved in the CEP, in collaboration with the European Commission and the Member States. Rules for interaction with external actors, e.g. international organisations, shall be devised from the legal point of view, including the dissemination of data by the CEP at its different levels. The legal aspects of the selected organisational structure and its administration model is reviewed, and solutions are proposed. Being a large research entity with various levels, the CEP must have clear rules on how decisions are made and how co-operation at different levels is governed, who is entitled to participate in decision making, and how and by whom the decisions are executed (link to Task 3.4) etc.

In the following text the parts of the listed points have been coded with colours depending on whether they originate from the Grant agreement and the EC's funding rules or if they are to be agreed within the CEP Consortium. The points that come from the EC usually cannot be changed, and they form fixed boundary conditions for establishing the CEP.

In addition, some key learnings have been listed, drawn from the existing European Joint Partnerships established in the Horizon 2020 program. Some particular aspects have been found to be challenging. like transparency of the decision making, the size of the consortium, etc., requiring special attention for making the partnership work more effectively

Legal frame

In ORIENT NM the selection of a future CEP type has been between co-funded partnership and co-programmed partnership. Even though the establishment of co-programmed partnership is considered to be easier, the project consortium is in favour of the co-funded partnership as this type has been already used successfully in the past (it corresponds to what was called previously EJP), thus there is some return of experience. In addition, from the operational perspective the co-funded partnerships resemble more the conventional EU funded projects. Co-funded European Partnerships, like any Research and Innovation Action, are indeed based on a Grant Agreement that is signed between the European Commission and a consortium of partners. The consortium partners are beneficiaries of the Grant Agreement, i.e., legal entities that execute the activities and incur costs that are eligible for reimbursement under the Grant Agreement.

Co-funded European Partnerships (and programme co-fund actions in general) are defined in the Horizon Europe rules for participation and dissemination as “actions to provide multi-annual co-funding to a programme of activities established or implemented by legal entities managing or funding R&I programmes, other than Union funding bodies; such a programme of activities may support networking and coordination, research, innovation, pilot actions, and innovation and market deployment actions, training and mobility actions, awareness raising and communication, dissemination and exploitation, and provide any relevant financial support, such as grants, prizes and procurement, as well as Horizon Europe blended finance, or a combination thereof. The programme co-fund action may be implemented by those legal entities directly, or by third parties on their behalf.”

In addition, the [Horizon Europe General Annexes](#) provide more details on programme co-fund actions. Furthermore the [Model Grant Agreement](#) has in its Annex 5 Specific rules for Co-funded Partnerships. There is also a specific [Proposal Template](#) for Co-funded Partnerships. [The summary of the rules for co-funded Partnership](#) and [Specific rules for co-funded partnerships also apply](#).

Items to consider from a legal point of view

Scope of co-operation

In the “scope of co-operation”, the extent to which the co-operation is governed in the CEP needs to be described, and the limits clearly stated. These limits will be based on the Vision Paper (VP) and the Strategic Research Agenda (SRA) prepared in WP 2. In the materials CEP, one of the most critical boundaries will be to define to what extent this CEP would be used for the benefit of non-nuclear technologies. The definition of the scope is important, as it greatly determines the participant make-up in the CEP, as well as the budget. The scope of the CEP needs to be checked frequently and reflected against the agreed work plan annually. The scope will be realised either 1) in actual research via calls for proposals, where the participating organisations with relevant affiliated entities and other participating organisations are able to propose and apply for funding for particular projects, or 2) in a macro-project with separate work packages. This is to be defined later in the planning process.

Governance

The organisational structure for the European Partnership was selected in T3.1 to follow the Co-funded model. As such, the governance is expected to closely follow that of a regular EC-funded project. The consortium is accordingly expected to do the following: (1) outline the governance and management of the Partnership, including advisory structures and mechanism still to be established; (2) demonstrate how the governance and management of the Partnership helps to achieve the defined vision and objectives; (3) describe how it will contribute to ensuring coherence and synergies with the EU research and innovation landscape; and (4) demonstrate transparency and openness during the Partnership as regards the identification of its objectives, priorities, vision, Strategic Research Agenda SRA and work programmes. The details of the governance structure will be agreed upon through the CA.

The main points describing the governance in the CA will include the conventional ones, which are by default foreseen in the DESCA model, as follows:

- a. Consortium bodies (General Assembly –GA- or equivalent; Management Board –MB- or equivalent; Coordinator; Secretariat or equivalent, etc.)
- b. General operational procedures
- c. Representation of the participants
- d. Voting rules and quorum
- e. Veto rights
- f. Responsibilities of the consortium bodies
- g. How to ensure fair governance including national decision-making processes

When studying the existing partnerships, the following items have been identified as areas for improvement in the governing approach:

- The Coordinator (or some type of MB comprised of a smaller subset of the partners) will need to have rights to speak on behalf of the Consortium like to sign the MoU, taking many iterations). This is necessary to have flexibility in the way of working of the Partnership. If the management does not have this mandate to speak, the daily operation of the Consortium becomes too stiff and unnecessary formal.
- In some EJPs no legal basis for covering the costs of the MB members was foreseen, leading to significant time spent and responsibilities taken, without right to any reimbursement. This *de facto* created hidden additional costs for the involved organisations that are not formally and officially recognised. In some large EJPs, important decisions also related with budget were in practice made by only a few persons (e.g., those involved in the MB). Budget decision should follow a transparent process integrating all partner
- The EC expects an (external) advisory board and/or head scientific officer to be appointed, but the roles and actual powers of these bodies have not been clearly defined: is their role merely advising, the advice not being binding for the Partnership, or can they actually exercise some control, e.g. by steering the scope or priorities of the Partnership? It is also important to define at which point in time over the duration of the Partnership are these advisory bodies expected to provide their evaluation.
- The governance and management model of large EJPs is often overly complicated: this unnecessarily multiplies the administrative tasks, the number of meetings and reports, etc. Less complex structures should be possibly devised. It should be here noted that much of the administrative overburden has its origin in the need for the annual revision of the workplan that is foreseen in Partnerships. In order to comply with this requirement, especially with an overly complicated governance in which the opinion of several advisory bodies is required, a paradoxical situation is created, in which the annual reporting has to start already after the summer, because otherwise it is impossible to timely prepare the next annual workplan. Ideally, the revision of the workplan should occur every 18 or even 24 months.

Participation rules for different organisations

It is expected that several different types of organisations will participate in the CEP. To accommodate the different needs and expectations, a set of governing rules will be required, as illustrated in the following outline and elaborated below:

- Ownership of the CEP (ministries and/or mandated organisations)
- General participation rules in a CEP
- Specific participation rules in a CEP
 - public research organisations
 - other research organisations
 - industry
 - affiliated entities and associated partners*
 - other participants
 - third parties giving in-kind contribution
 - subcontractors
 - recipients of financial support to third parties
- Access to the infrastructure necessary for doing the research
- Rules for leaving the CEP

* There are various ways of participating in projects without signing the grant agreement. Entities may participate as affiliated entities (called linked third parties in Horizon 2020) if – and only if – they have a legal or capital link with one of the beneficiaries. Affiliated entities carry out work in the project and may declare costs. Entities may also participate as associated partners. Associated partners carry out work in the project but cannot declare costs. Entities may also participate as third parties providing contributions. These third parties do not carry out work in the project – they just give in-kind contributions – and the beneficiary they provide the contributions to declares the costs of the contributions. And finally, entities may participate as subcontractors who carry out work on the project and invoice the beneficiary who may declare the invoice to the project. Source: https://www.era-learn.eu/documents/qa_summary_4march

The participation in the CEP will be decided at national level, with the most appropriate actors being mandated by the programme owners (generally ministries or related funding agencies). In addition, the rules of the EC for the participation of affiliated entities, associated partners and other participants, must be taken into account. It is important to tailor the rules for different organisations depending on the role that they want to take in the CEP. Some partners may also have important technical infrastructures that could be utilized by other partners in the CEP. In such cases, a means to facilitate access to such infrastructures in a manner that is fair for both users and infrastructure owners is required. Similarly, it will be important to agree on the rules governing the exit of a partner from the CEP when necessary.

Beneficiaries are the legal entities involved in the action that are parties to the Grant Agreement. As signatories of the Grant Agreement, they are fully responsible towards the granting authority for implementing the project and for complying with all the obligations stated in the grant agreement. Beneficiaries charge contributions to the action. They must have the appropriate resources to implement the action. If they rely on affiliated entities or other participants, they retain the sole responsibility towards the granting authority and the other beneficiaries. Beneficiaries must ensure that the contracting obligations under the Grant Agreement are extended to other participants, such as affiliated entities, associated partners and subcontractors.

In order to be included as an affiliated entity under the Grant Agreement, a legal entity must comply with the definition of “affiliated entities” in article 2 of the model Grant Agreement (and which refers to Article 187 of the Financial Regulation). Affiliated entities charge contributions to the action under the same conditions as the beneficiaries and must implement the action tasks attributed to them in Annex 1 of the Grant Agreement. Their contributions will be included in Annex 2 and will be taken into account for the calculation of the grant.

Associated partners may not charge contributions to the action and the costs for their tasks are not eligible (may not be included in the estimated budget in Annex 2).

Subcontractors cannot charge contributions to the action and must implement the action tasks attributed to them in Annex 1. The beneficiaries’ costs for subcontracting are considered entirely covered by the contributions for implementing the work packages (irrespective of the actual subcontracting costs incurred, if any).

When studying the existing partnerships, deficiencies have been identified in the governance of the partner composition over its lifetime. One issue has been the means to integrate new partners in the Consortium, if the partnership is realised as a macro-project, when all of the work package activities (technical and networking tasks) have been defined and distributed among the partners already from the start of the program. Likewise, a means for smaller companies/suppliers/countries to join the project, after others have signed the agreement already, is missing. This is also observed in partnerships working via separate calls for projects, when a second wave of proposals within the CEP needs new partners (who may have excellent delivery), who are not eligible because they were not partners from the beginning. This poses an obstacle for them to enter the partnership.

Funding mechanisms

In principle the CEP funding should resemble that of a conventional EU project. The issues to consider include:

- EC funding and its rules
- Complementary “national” funding and its rules
- In-kind contributions
- Financial support to affiliated entities
- Cost structure
 - Conditions for costs to be eligible
 - Purchase of good and services
 - Ineligible costs

The actual EC funding rate will be a result of negotiations, and eventually that rate will also define the extent of the matching funds. It is important that no costs other than overheads remain “hidden”, in order for the reimbursement rate to correspond to reality, as much as possible. In any case, it can be assumed that the CEP funding will also include direct industry and national participation, as well as in-kind contributions. Especially funding via in-kind contributions will need careful consideration and definition, as they are not widely used, and their applicability is not well-understood. In addition, the EC has set rules for affiliated entity support, which needs to be included in the financial arrangements (as mentioned in the participation rules, above). This inevitably also requires detailed planning for eligible costs, different purchases, etc.

The complementary funding decision from the national actors will be an important topic to be agreed upon. The complementary funding decisions will need to be binding in the early stage of the programme. This has caused some challenges in the existing partnerships. The need for matching funds is also a potential difficulty connected with taking on-board new partners: if these are expected to be funded for the remaining part by national funds, the corresponding ministry or funding agency may need to agree to increase its financial involvement, which may be tricky; if, in contrast, such increase does not happen at the level of ministry or funding agency, then the new partner needs to dispose to own matching funds.

Execution of the work

The EC follows the execution of the CEP according to its review plans. The following topics have been raised to be inspected from the legal point of view, and therefore they can act as a basis for the agreements within the consortium. However, not all of these points are applicable to the CEP as such but can be either rejected or modified.

- *Programme duration*: Is the duration of the programme sufficient to allow all actions to be fully implemented and concluded?
- *Programme plan (applicability of these points is defined after it has been decided whether the CEP works via internal call or as a macro-project with dedicated work packages like in a conventional EU project)*:
 - The CEP plan must include distinct projects for the activities related to the co-funded call (if applicable) and/or additional activities (if applicable)
 - In the case of a co-funded call(s), the plan must include a dedicated deliverable(s), with the following elements:
 - the ranking list(s) of the projects, if a selection for realisation between the projects needs to be done;
 - transparency of the evaluation process judged possibly by a separate observers;
 - the joint selection list of the projects to be funded, and from each consortium partner participating in the joint call, a formal and duly signed commitment on availability of funds for the selected projects.
- *Associated countries / members*: Any countries that may benefit from the provisions of the transitional arrangement on candidate Associated Countries, must also be treated according to the provisions of this transitional arrangement, i.e., as if they were Associated already at the time of submitting the proposal.
- *Joint calls for projects within the CEP (if the CEP is decided to work in that way)*: The actual procedures for the joint calls include several requirements:
 - Consortium follows a single joint transnational call for proposals when selecting the projects
 - A requirement of the joint call(s) is that projects are transnational, i.e., at least two independent legal entities from two different Member States or Associated Countries or one legal entity from a Member State or

Associated Country and one legal entity from a non-associated third country (not receiving financial support)

- The consortium foresees to publish the joint call(s) on the relevant platforms and beneficiaries' websites
- The consortium keeps the joint call(s) open for at least 2 months
- The consortium makes the selection through a two-step procedure:
 - Step 1: eligibility check / review at national or transnational level and
 - Step 2: single international peer review?
- A two-step procedure is necessary to ensure that only entities that are eligible for funding under the national funding rules are invited to Step 2, and that consortia can balance the requested funding and available funding per participating Member State and associated country between Steps 1 and 2.
- In Step 2, the consortium evaluates proposals with the assistance of an advisory panel the composition of which is defined with the EC.
- Proposals are ranked according to the evaluation results
- Selection of transnational projects ('joint selection list') is based on the order of the ranking list (or the ranking lists, if there are different topics)
- The consortium foresees at the end of the evaluation of the co-funded call, and at the end of the project, deliverables with details about the co-funded projects (template allowing for transfer to Commission IT system)
- *Will beneficiaries in the consortium apply for funding under the co-funded call for proposals?
 - In case answer to question * is N.
 - Does the consortium clearly stipulate "beneficiaries are not eligible to apply for funding under the co-funded call?"
 - In case answer to question * is Y.
 - Does the consortium identify the beneficiaries which might apply for funding under the co-funded call for proposals?
 - Does the consortium explain the measures to be taken to mitigate the risk of, perception of, or de facto conflict of interest or unequal treatment of applicants?
 - Does the consortium reflect all these measures fully in their description of activities for the preparation and implementation of the co-funded call as well as in relation to the monitoring of the trans-national projects?
 - Will these measures be implemented by demonstrating that information is kept non-accessible to other members of the consortium (or the departments concerned, in case a beneficiary is both research funder and research performer) that might apply to the co-funded call?
 - Will these measures include a procedure ensures the independent and fair treatment of complaints related to

the call, in particular for complaints relating to unequal treatment of applicants?

- Specific rules apply for co-funded partnerships when beneficiaries implement financial support to third parties:

When implementing financial support to third parties in Co-funded Partnerships, the beneficiaries must respect the following conditions:

- proposals must be ranked according to the evaluation results and the selection must be made on the basis of this ranking
- the selection procedure must be followed by an independent expert observer, who must make a report.

Where the financial support is implemented through implementing partners, the beneficiaries must:

- ensure that the partners comply with the same rules, standards and procedures for implementing the financial support,
- implement effective monitoring and oversight arrangements towards the partners, covering all aspects relating to the action
- ensure effective and reliable reporting by the partners, covering the activities implemented, information on indicators, as well as the legality and regularity of the expenditure claimed
- ensure that the partners provide that the bodies mentioned in Article 25 (e.g., granting authority, OLAF, Court of Auditors (ECA), etc.) can exercise their rights also towards the final recipients where the call conditions restrict participation or control due to strategic assets, interests, autonomy or security reasons: apply the restrictions set out in Annex 5 mutatis mutandis to the final recipients and their results.

Source: https://ec.europa.eu/info/funding-tenders/opportunities/docs/2021-2027/common/agr-contr/general-mga_horizon-euratom_en.pdf

Results

One of the most important areas to forge the agreement upon will be the ownership and user rights of the results produced in the CEP actions. Specific points are identified as follows:

- Agreement of background incl. access rights
- Ownership of the results
 - ownership by the beneficiary that generates the results
 - joint ownership by several beneficiaries
 - rights of affiliated entities and others
 - Euratom ownership
- Protection of results
- Exploitation of results

- Dissemination of results
 - open access
- Transfer and licensing of results
- Access rights to results
 - waiving of access rights
 - access rights for other beneficiaries
 - access rights of affiliated entities
 - access rights of EU institutions, bodies, etc.
 - access rights for third parties

As always, the ownership of the background information needs to be described first. In the CEP, the ownership of the results may require more extensive agreements than usual, as there will be many participants on different organisational levels producing the results. Similarly, the protection, exploitation, dissemination, licensing etc. of the results may require extensive agreements. The right to access the results may also be different for different kinds of partners, which must be specified in the agreements.

Data and knowledge management

Data management should list the documents that are necessary for implementing the CEP, the deliverables expected from the CEP, the records that are needed, and of course describe the consequences if non-compliances arise. It will also be important to agree on how the data will be stored after the CEP termination.

This point has been criticized quite heavily by the EC in some existing EJPs

- required documentation
- obligation to keep records
- obligation to submit deliverables
- consequences of non-compliance

Other items

- recruitment
- gender equality
- ethics and research integrity
- conflicts of interest

Liability and confidentiality

The liability of the consortium towards the EC for the fulfilment of the tasks and the execution of the ECP will be defined in the Grant Agreement. The liability of the participants towards each other will be defined in detail in the CA, the main principle being that liability is limited to direct damages and with a monetary cap.

Confidentiality, when it is needed, will be ensured by including confidentiality clauses in the CA.

Suspension and termination and force majeure

The right of the beneficiaries to request, and the EC to suspend and terminate, the CEP will be regulated in the Grant Agreement. The Grant Agreement also defines force majeure, and details situations where a party cannot be considered to be in breach for not fulfilling its obligations.

The rules set forth in the Grant Agreement will be reflected in the CA, to apply within the consortium and between the beneficiaries.

Open topics to be taken into account in the final version

During the course of this document preparation several topics have been raised to be decided before publishing the final form of this report (i.e., D3.7):

- Boundaries of topics that the CEP handles, mainly being an issue to select which non-nuclear topics are included and to what extent the development of nuclear research is able to be applied on the non-nuclear side.
- Is the CEP working as a macro-project with fixed work packages or should it work via internal calls to establish separate projects?
- Freedom of the coordinator/ MB to talk on behalf of the whole consortium in order to keep the daily work flexible.
- Participation and financing rules for different participants.
- Access to infrastructures (EU-OFFERR project to be combined here is possible)
- Applicability of the in-kind participation.
- For the execution of the work to be determined what are the actual clauses to be followed as not all the EC review clauses are applicable.



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