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Agreement Guide

– an aid for the drawing up of the agreement

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1 Introduction

Vinnova has provided this guide to make it easier for you to enter into project agreement in projects where we are involved in funding. Our purpose with the guide is to help you get started with the drawing up of the contract and to draw your attention to important issues to regulate in the agreement.

In section 2, we explain why you should enter into a written project agreement with each other.

Section 3 sets out the terms and conditions that a project agreement should contain and what conditions a project agreement usually contains and what may be regulated in the terms.

Finally, section 4 contains some reflections and things to consider before signing the contract.

What is stated in the guide is not exhaustive as to what a contract should contain. The guide also does not contain examples of terms, model clauses, or templates. This is because each agreement needs to be drawn up based on the purpose of the project and your own conditions and interests. We recommend that you contact a lawyer in your own organization or at a law firm for help with the content of your particular agreement. Other than this guide, Vinnova does not assist you with your agreement.

2 Why agreement?

The project agreement is one of the most important documents when several parties are to implement a project together. The agreement clarifies rights and obligations and helps you identify and clarify different perceptions and expectations before the project begins. The agreement has great probative value and is also an act to go back to if someone forgets or wants to change what you have agreed upon.

In collaborations where results such as for example inventions or computer programs emerge, a written agreement is in principle required because there are many issues that need to be considered and regulated. Being without a contract in such collaborations is inappropriate and most companies would not carry out such a project without a contract. If there is no explicit regulation, there is a great risk that after the project you will not be able to use the results in the way you intended.

Vinnova therefore requires that the parties enter into a project agreement (see Vinnova's general terms and conditions for grants § 1.4). In our general terms and conditions, the agreement you are to enter into is referred to as "project agreement", but other names for such agreements are, for example, cooperation agreements and consortium agreements. The most important thing, of course, is not the name, but the content of the agreement.

3 What should the agreement regulate?

According to our general terms and conditions § 1.4, the project agreement shall include your mutual commitments, conditions concerning right to results and background information and other issues of significance to the cooperation. This guide describes the most common terms and conditions found in project agreements regarding R&D&I collaborations and they are most often found under the following headings.

Parties

Purpose or background

Definitions

Scope

Financing

Project organization and governance

Communication

IPR-regulation

Publication

Reporting

Confidentiality

Liability and limitations of liability

Damages

Breach of contract

Contract period

Dispute resolution

Applicable law

Subsequent contractual effects

Amendments and additions

Some things always need to be regulated in your project agreement. Those include terms and conditions on parties, scope, funding and IPR (if it is a R&D&I- project).

Other terms and conditions/headings are optional from Vinnova's side and in addition, there is supplementary law for all of them except publication. "Supplementary law" means general legal rules and principles relating to, for example, breach of contract, termination, damages and court competency, that apply to the parties to the contract unless otherwise agreed. This means that even if you do not agree on damages or dispute resolution, etc., there are rules and principles that apply anyway, which complements, or "fill out", your agreement. If you wish to deviate from what follows from the supplementary law or are not aware of it, you may expressly agree on what should apply instead.

The terms on IPR[1] and publication are special for R&D&I-collaborations in particular, while the other terms may be included in any type of agreement. Depending on the project, there may also be a need for other types of conditions.

3.1 Parties

The agreement must identify the organizations which enter into the agreement and usually these are the organizations that participate in the planning of the project, implement the project and share the results and risks associated with the project. In addition to specifying the entity's name or the name of all parties, the organization's registration number should also be included as it constitutes a legal person's identifier.

3.2 Purpose or background

In order to better understand the rest of the agreement, it is good to describe the purpose of the collaboration or the background to it. The agreement is then placed in a context and if in the future there are different interpretations of the meaning of the agreement, a stated purpose or a background description may be helpful.

3.3 Definitions

Including clear and separate definitions of things such as results, background information, own activities, etc. often facilitates the reading of the agreement,

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[1] IPR (Intellectual Property Rights) is a term for the legal protection that is granted or can be given to intangible/intellectual assets such as for example inventions and computer programs.

especially if there are many concepts that need to be defined. Definitions can also be included in the running contract text. Having definitions in an agreement is not always necessary, but in agreements regulating R&D&I -collaborations, they often play a role as many concepts need to be clarified and adapted in relation to the project and other conditions. If a term or word is unambiguous, then it does not normally need to be defined. However, sometimes concepts are used in one way within a certain organization or industry, and in a different way in another organization/industry. In such situations, collectively defining key concepts in the agreement prevents future disagreements.

3.4 Scope

A condition that is often referred to as "Scope" is the very essence of the agreement. Such a contractual term must indicate what the parties must actually do in the context of the project. For example, it needs to be stated who does what, when it is to be done, whether a subcontractor is to be procured, what should be delivered to whom, what the result will be and how it will be used, etc. It is often practical to attach the project description/project plan to the contract provided that it sets out sufficiently clearly the parties' commitments in these respects.

3.5 Financing

Clauses governing financial matters are sometimes headed Finances, Costs, Compensation or Similar, depending on what they contain. Here you specify the costs each party is expected to incur to carry out its part of the project. This can be done, for example, by attaching the budget as an annex to the agreement. Sometimes the budget is included in the project description and if the project description is part of the agreement, of course the budget does not need to be attached separately.

Furthermore, you can regulate how each party's costs are to be financed and how the funds we pay out to the coordinator, i.e. the party coordinating the project and representing the other parties in relation to Vinnova, are to be allocated at the respective disbursement stage. Upon completion of the project, each beneficiary must have received the funds to which it is entitled under our decision and the terms of the grant. As a general rule, the amount of funds to which a beneficiary is entitled is determined by the *aid intensity* (grant expressed as a percentage of the beneficiary's eligible costs) and not by the amount stated in the decision. In practice, this means that if, during the project, a beneficiary incurs lower costs than

budgeted for whatever reasons, the grant to that party will also be reduced accordingly.

Since, according to our general terms and conditions for grants, the coordinator must report all parties' costs etc. to Vinnova, you should regulate when and how and what information the other parties should provide to the coordinator. It may be appropriate to deal with such reporting obligations in a separate clause or section of the agreement, as this is an important part of projects where one or more parties receive funds from Vinnova.

3.6 Project organization and governance

An agreement should regulate how the project is to be managed, especially if more than two parties are involved. Often there is some form of intended structure or organization for this. If covered in the project description, a short reference can be made to it in the agreement, but otherwise you should regulate this in a contract provision. How detailed such provision is made varies, but it is useful if it states which functions such as steering group, project group, project manager and reference groups, etc. that exist, and what their tasks and mandates are. Some agreements also regulate in general terms when and where meetings are to take place.

3.7 Communication

It may be useful to have a communication plan for the project (external and internal). It can be added as an annex to the agreement and needs to be fully adapted to the parties, project, and objectives.

3.8 IPR regulation

Perhaps the most important topic and issue to deal with in R&D&I – collaborations is how ownership of project results is allocated and how the parties may use jointly owned and other parties' results. This regulation also takes the longest to agree on. Please start this discussion early in the project planning process.

A starting point in R&D&I- collaborations is that the party that produces a result also becomes the owner of the same. If several parties produce something together, the result is jointly owned by those parties. This starting point needs to be clarified and supplemented in several respects. If you deviate from the starting point, you need to take into account, among other things, the European Commission's framework for State aid for research, development and innovation so that there is no occurrence of indirect State aid.

In addition, you need to relate to § 7.2. of our general terms and conditions for grants. In short, this section means that one party should have the right to use another party's background information and results if it needs it both for the implementation of the project and to use its own results outside the project. However, a party that owns background information has the possibility to exempt it from another party's right of use before the project starts. Please read the full provision in § 7.2. for details and the associated Guide to Vinnova's terms and conditions on right to use published on Vinnova's website. The provision in § 7.2 exists because Vinnova is very keen that results from projects wholly or partly financed by us can be utilized.

Examples of issues you need to consider in your IPR regulation include:

- Allocation of ownership of results
- Management of the so-called exception for IPR of academic staff (Sw. "*lärarundantaget*"), if one or more of the parties to the agreement is a university or other higher education institution
- Questions related to co-ownership

— How ownership of the result is allocated

— The proportions/shares in which ownership of the result is allocated among the partners

— The manner in which each owner of results may use it

— Whether group companies or other affiliates to the owner may use the result

— Whether and how the licensing of results may take place

— Distribution of licensing revenue if any

— Who applies for and administers patents or other registrable rights, and the process for it

— Cost allocation for patents and defense against possible infringements

— Right and/or obligation to submit complaints with regard to IPR infringements

— Transfer of ownership shares

— How to end co-ownership

- Party's use of another party's result

— How the result may be used

— If the entire group may use the results

— Whether and how sub-licensing of the result may take place

— Compensation for using the results of another party

— License period

— Process for managing licensing and licensing terms

- Transfer of results

— Right of option/pre-emption for contracting parties

— How compensation is determined

— Reservation of rights of use for the result transferred

- Handling of so-called background information

— The background information included in the project

— Background information exempted from access rights of others

— See also issues above on the use of other parties' results

- Responsibility for results and background information, e.g. what happens if the delivery infringes third party rights, what happens if an exclusivity expires
- Open source – if open source is intended to be used or used in the project, (in background information or results) it is good to include an obligation to inform the other parties about it because the open source user must always take into account the licensing terms of that particular source code.
- Right to improvement or development of results

Even if it is not an R&D&I project or a project where some form of exclusivity/trade secrets is expected, you should still regulate the use of the result. You are obliged to ensure that the results are used in accordance with the utilisation plan (see Vinnova's general terms and conditions for grants § 7.1).

3.9 Publication

If a university or other higher education institution is involved in the project, there is usually an interest, or even an obligation, on their part to publish results produced in the project. This interest may sometimes be against the interest of companies in keeping the results secret, either as trade secrets or in order to apply for a patent later. It is therefore important to regulate what may and may not be published or otherwise made public. It is also good to have a process that describes

how, for example, a party or its employees should proceed when publishing becomes relevant.

Regulating and managing publishing is particularly important when results are produced together or when another party's results or background information may become part of the results to be published.

3.10 Reporting

According to our general terms and conditions for grants, the party coordinating the project (coordinator) is responsible for reporting to Vinnova. In addition, the coordinator is obliged to inform Vinnova about various things. Other parties to the project are responsible for providing documentation or other information so that the coordinator can fulfil his or her obligations in relation to us. In order to clarify between the parties what is to be provided when and how, you should regulate these issues in your agreement. On the responsibility of the coordinator and other parties in these respects, see also our general terms and conditions § 1.5, first paragraph, § 1.6, § 1.7, § 5 and § 8.

3.11 Confidentiality

Often, confidentiality issues are regulated in collaborations on research, development and innovation. Even if you do not believe that any secret/confidential information such as trade secrets and source codes, drawings, etc. will be displayed or exchanged within the framework of the project, it is nevertheless good to have a confidentiality regulation in place should this become relevant. There are fairly standardized confidentiality conditions. Often there is also a process about how to mark, hand over and store secret information, and about how the information may be used.

However, authorities cannot make any additional confidentiality undertaking than what follows from the Public Access to Information and Secrecy Act (2009:400).

Sometimes a non-disclosure agreement (NDA) is also concluded before or during contract negotiations on the project.

3.12 Liability and limitations of liability

Normally, all parties are responsible for the performance of their part of the contract. Depending on the nature of the cooperation, who is involved in the project, the roles of the contractors, what should be done with the result, etc., it may be

useful to explicitly regulate what you are responsible for and what you are not responsible for in relation to each other in other respects.

For example, since, under certain conditions, you are entitled to licenses to each other's background information and project results (see Vinnova's general terms and conditions for grants § 7.2 and IPR regulation above), it is appropriate to agree on the scope of responsibility of the owner (if any) for what someone else uses. One question is, for example, who should bear the risk in the event that results infringe the exclusive rights of third parties and what happens if an exclusive right ceases.

Guarantees are rarely given in collaborative projects.

Liability and limitations of liability are closely linked to liability for damages, and limitations of liability are often dealt with together with the liability for damages in the contract.

3.13 Damages

According to the general rule, you as contracting parties are responsible to each other if you are negligent. A person who violates a term in the contract, i.e. commits a breach of contract, is normally considered negligent. Consequently, provisions on damages are closely linked to the obligations and liability of your parties.

In simplified terms, the offender is obliged to compensate the other parties for the damage caused by the breach of contract. In Swedish law, the general rule is that a party is obliged to compensate the entire damage regardless of how large it is. Since this can be quite expensive but above all difficult to predict, there is a possibility that the parties agree on limitations on liability. It is reasonable for a party to wish to limit its liability for damages. Such restrictions may, for example, consist of ceilings/caps, be put in relation to costs or to certain types of costs. Multiple limitations can also be combined with each other.

Damage caused by breach of confidentiality conditions is sometimes excluded from monetary ceilings/caps.

The person who suffers damage will normally have to prove the amount of the damage. Since it is often difficult to prove the amount of damage, the parties to the contract may agree on a reasonable amount to be paid as damages provided that the damage as such is shown.

Although unusual in cooperation agreements, it should be mentioned, for the sake of order, that parties may agree on the imposition of periodic penalty or fine. A penalty or fine may replace or be made payable in addition to any damages. The

penalty payment is usually linked to the breach of contract itself and not to the damage suffered by the party. In this way, the parties completely avoid the question whether the breach of contract has caused any damage and, if so, the amount of the damage.

3.14 Breach of contract

You do not need to have terms that regulate breach of contract because there is Swedish supplementary law and if you regulate issues of liability, parts of issues related to breach of contract will thereby be handled. Provisions on breach of contract, liability and damages are all linked together, since where a party is in breach, or where liability is otherwise triggered under the agreement, this often results in liability for damages but also gives rise to other questions. These may be questions regarding the time and manner in which the contract can be terminated in the event of someone's breach, what happens to the rest of the cooperation if a party commits a breach, and how and who can give notice of a breach of contract.

Keep in mind that if one party does not implement their part of the project, other parties need to think about how to solve this, since a prerequisite for our funding is that the project is carried out in accordance with the project description. Should you find yourself in such a situation, please contact also your administrator at Vinnova to see what alternatives there are.

3.15 Contract period

Most agreements specify a period of time for the duration of the agreement between the parties. It is common for the contract period to be linked to the time it takes for you to carry out the project or what you otherwise agree on.

Often, the contract period follows naturally in collaborations where the project is clearly defined, since all commitments arising from the agreement are normally fulfilled when the project is completed. Some terms, however, usually "survive" the contract period/project period, such as conditions on, for example, the right to background information and results, confidentiality and dispute resolution.

3.16 Dispute resolution

A dispute settlement clause may refer disputes to a competent court, arbitration[2] or mediation. A dispute settlement clause is not mandatory in the project

[2] See the Arbitration Act (1999:116)

agreement but again, if you want to derogate from otherwise applicable rules, you need to explicitly agree on a different solution.

In order to be certain where a potential dispute will be settled, the parties sometimes agree that it is a particular district court that will have jurisdiction to adjudicate a dispute.

If the parties do not want a dispute to be settled by a general court (the district court as first instance), the parties may agree that disputes shall be settled by arbitration, specifying the arbitration institute and the rules of procedure. Various arbitration institutes often provide their own model clauses that regulate the issues that should be included. Different arbitration institutes have different rules. An arbitration tribunal is a private court that the parties pay for themselves. The costs of arbitration can be high[3]. Unlike a district court judgment, arbitral awards cannot be appealed on the merits. This means that a dispute will only be adjudicated in one instance, leading to a faster final decision. What also distinguishes arbitration proceedings from ordinary courts (district court, court of appeal and Supreme Court) is that hearings and arbitral awards are not public. If you have a valid arbitration clause in the agreement, a general court is prevented from adjudicating your dispute.

Before the commencement of an arbitration or general court procedure, the parties may attempt to settle the dispute through mediation. Many organizations (arbitration institutes) that offer arbitration also offer mediation. If that is the case, you should state what applies in the agreement. There is an Act (2011:860) on mediation in certain civil law disputes that encourages the parties to turn to mediation as this often saves time, energy and money for the parties.

The possibility of future cooperation typically increases if you decide amicably, so it is also recommended that before you even take the dispute to mediation, agree on an “internal” process of trying to resolve disagreements. An example of such the internal process can be found in § 24 of Vinnova’s model agreement for the VINN Excellence Center from 2006.

Mediation is also possible in the district court and the court of appeal[4].

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[3] Expedited arbitration entails lower costs and is something that can be used for less complex disputes.
[4] On special mediation, see also Chapter 42, § 17, second paragraph and Chapter 50, § 11, second paragraph Code of Judicial Procedure

3.17 Applicable law

The applicable law or so-called conflict-of-law clause means that you choose which country's law is applicable to your contract. If you do not choose/agree there are supplementary rules on which country's law is applicable. If all project partners are Swedish and the project is carried out in Sweden, Swedish law will of course apply.

If there are foreign parties involved in your cooperation, it is good to explicitly choose the law, and normally choose the law of the country in which the project is carried out, where the financer is located, or where most parties or the coordinator have their domicile which, except in exceptional cases, is Swedish law in Vinnova funded projects[5].

3.18 Subsequent contractual effects

Sometimes the parties regulate what happens after the contract period has expired. For example, provisions on access to results and background information, confidentiality and dispute resolution may be relevant even after the project has been completed and the contract has ended and sometimes this is clarified in the contract.

3.19 Amendments and additions

The starting point is that a party cannot unilaterally change the content of a contract, but rather all contracting parties must agree on an amendment. In contracts, it is common to include a provision that governs how the agreement can be changed. A common solution is to state that amendments and additions to the agreement shall be drawn up in writing and signed by the authorized representatives of all parties to be effective.

If a change to your agreement means, for example, that the project description changes or that parties are added to or terminate their participation, remember that in most cases it will be required that Vinnova approves the change by means of an amendment decision. If Vinnova considers that the change is to the detriment of the project, it may result in a request for amendment being denied. Your agreement must be compatible with Vinnova's decision and terms throughout the project.

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[5] Please clarify that it is the country's substantive law and not its conflict-of-law rules unless it is the conflict-of-law rules you want to refer to.

4 Things to consider before drawing up and signing the contract

Please remember that negotiating and signing ***an agreement takes longer than you think,*** so start in good time. The more parties, the longer the time. Vinnova has a model agreement available on its website. This has been developed for the VINN Excellence Center (2006) and has been updated to Vinnova's Competence Centre initiative. The model agreement is also translated into English.

The model agreement should be seen as an aid to the parties having something to start from and something that hopefully will shorten the negotiation time. The model agreement is adapted to a specific Vinnova initiative and is consequently written based on the purpose and objectives of this particular initiative. We cannot recommend, therefore, that you use this agreement unless you carefully consider whether it fits in your contractual relationship. Do not hesitate to read the model agreement and find inspiration or examples of provisions that may be relevant for you.

If ***foreign parties*** are involved and if you choose another country's substantial law to govern the contract, then include provisions on all of the above issues so that all parties have as good knowledge as possible of what applies to your contractual relationship. Countries have different rules and often an organization (at best) only has knowledge of their own country's law.

Each Party is responsible for its ***ability and limitations to enter into agreements*** and the commitments resulting therefrom. Vinnova's grant and terms do not change obligations that may follow from other laws and regulations. For example, if a party is an Government agency or other public body and is to engage a consultant within the framework of the cooperation, the agency needs to procure in accordance with the Public Procurement Act. Another example is that certain organizations are subject to statutes, laws or regulations, etc., that impose restrictions on the activities of the organization. This in turn may mean that the allocation of ownership and rights of use should be adapted so that parties and society get the most out of the results of the cooperation.

The agreement must always be compatible with and facilitate the fulfilment of Vinnova's terms and conditions for the grant.