

Exclusion of background in FP7

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1. Introduction

This paper summarily introduces the issue of *exclusion of background* in the context of the Seventh Framework Programme of the European Community (hereafter FP7). This issue is regulated by the FP7 [Rules for participation](#) and the [Annex II to grant agreement](#), but its outcome is largely the result of a contractual agreement between participants.

2. What are access rights?

Research projects involve the sharing of knowledge. In general, participants bring to the project their own knowledge (e.g. data, know-how and other assets that may or may not be protected by intellectual property (IP) rights), which may form part of the so-called *background*¹ as long as it is *necessary*² for another participant to carry out the project work or use its own foreground. Therefore, the participants are reciprocally using information of other participants. Under FP7, a user right (often a licence) to use this information is called an access right. When the background is needed, the granting of these access rights is mandatory. However, it is possible to exclude access to pieces of background so as not to have to grant such rights later on.

To enable participants to do so, article II.31 of the Annex II to the grant agreement provides that they may define the background needed for the project and, where appropriate, may agree to exclude specific background. This allows them to agree on a balance between what information they want to supply to the project and, at the same time, to make sure the information that is necessary to implement the project or to use some of its results is available.

Please note that participants should inform each other as soon as possible of any limitations to the granting of access rights to background, due, for example, to the existence of a previous agreement (such as an exclusive licence) that limits their freedom to grant access rights afterwards.

3. Exclusion of background

During the negotiations on the definition of background, the participants may agree to exclude some of their background, as mentioned. In a written agreement (for example as part of the consortium agreement), they may, if necessary, exclude specific background to which no access rights will be granted.

The negotiations and the resulting written agreement on exclusion of background should be concluded, in principle, before the signature of the grant agreement³. However, the written agreement on the exclusion might be modified during the project, by consensus, notably (but not exclusively) when a new participant joins the project. Furthermore, the participants should take into account that:

- In many cases, it may not be necessary to exclude specific elements of background, simply because they are not needed for the project (background is commonly considered necessary if it would be impossible to carry out the project, or to use the foreground, without it or if it would imply significant delays or unnecessary financial or human investments to “duplicate” that background)⁴.
- The participants may also agree on a list identifying which participants’ background is available for access by the other participants. Everything that is not included in this list

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is excluded. This approach makes it clear which background is accessible and to whom access is granted (if, for example, some elements of background are available to some participants and not available to others). This option (commonly known as a “positive list”) may be particularly useful to participants composed of several units or research teams when only some of them are actively and concretely involved in the implementation of the project. However, this type of list should be drafted carefully, and in good faith; it should not contain elements of background that presumably should be available for access later on.

- The participants may also wish to draft a list identifying only the background to which no access rights are available, i.e. clearly stating which elements of background are excluded (for example a specific patent, an identified software, etc.) ideally in the form of a summarised information which enables the other participants to evaluate whether or not it might be necessary to the project. This practice is commonly known as “negative list”.

Under FP7, a combination of these two approaches is possible. The partners may annex to the consortium agreement both a “positive list” and a “negative list” of background to frame the issue. Under this option, the participants should first define which background should be available to access rights and which background they wish to exclude (to determine with the other participants whether or not it is needed for the implementation of the project or if there is valid ground to allow for its exclusion). If necessary, the agreement on exclusion of background can take the form of a bundle of bilateral agreements between partners if the scope of exclusion is different for different partners. The issue should be negotiated among them, taking into account that a non-agreement or the exclusion of background that proves to be necessary to the project at a later stage may cause the project to fail. For this reason, whatever option is chosen (particularly the “positive list”) should be updated whenever necessary.

4. Find out more

[IPR-Helpdesk: How IP rules work in FP7](#)

[European Commission: Guide to IP Rules for FP7 Projects \(28/06/2007\)](#)

1. Pursuant to article 2.5 of the FP7 Rules for participation ‘background’ means the information and intellectual property rights that participants hold before the signature of the grant agreement and which is needed to carry out the project or use the foreground (see also article II.1.4 of the grant agreement). On the other hand, ‘foreground’ means the results of the project, including information, as well as any intellectual property rights related to these results (see article 2.4 of the FP7 Rules for participation and article II.1.7 of the Annex II to the grant agreement).
2. See articles II.33.2 and II.34.2 of the Annex II.
3. The modalities for the economic conditions governing the granting of access rights are defined in the grant agreement in regards of this date.
4. See for example definition of “needed” in section 1.2 of the [DESCA CA model](#) and compare it with that under section 1.2 of the [IPCA model](#) from EICTA.

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