



“Alone at the grant office” - Survival Kit – LEGAL - PART 4

Legal aspects of joining international Research & Innovation

Programmes - check list - *Risk Management*

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Risks – Why is joining a new research and innovation programme challenging?

The biggest challenge stems from unfamiliarity. This can be due to lack of knowledge of the funder, the type of research funded, the call documents and the terms and conditions (T&Cs). Furthermore, there may be different partners from other countries and institutions that you have not worked with before. If these are international programmes, it may not just be other EU countries or associated countries or third countries. In other cases, there may be a new Principal Investigator (PI) at your institution that has found a funding opportunity and does not understand that it may prove difficult or impossible for the institution to support the application.

In the particular instance of a Tender Submission you are legally bound upon submission which, from the outset, is a different form of engagement from usual research funding calls.

If the project is funded but cannot be fulfilled or fails for whatever reason, there may be both financial and reputational fallout for both the institution and researcher. Therefore, it is both necessary and prudent to assess the risks of these applications.

When should you assess the risks?

The best advice is to assess as early as possible in the application process, ideally before submission. Research support can then help both with the application itself but also can ascertain and highlight if there are any 'red flags' or obstacles to participation. It can be very difficult to do this if the proposal has already been submitted, has been approved for funding and there is no chance of negotiation prior to grant acceptance.

Where do I look to find the risks?

Firstly, seek all documents regarding the call; the Terms and Conditions and any Model Contract, or other agreements that are available. In the case of a Tender Submission, both the Model Contract and any other agreement that you are expected sign if successful should be made available by the Tendering party before the closing date. If not, then you should ask. The usual mechanism for doing so is through FAQ facility (the timeline for which is usually clear on the website). Finally ask the PI for the proposal submission itself, this will give you an understanding about the type of work being undertaken, the costs involved and information about the other partners (if any).

What are the legal risks?

From a legal standpoint, you are endeavouring to see what your institution will be responsible for by accepting this funding. Terms to look out for and check include

- **Liability** – “Comprehensive legal term that describes the condition of being actually or potentially subject to a legal obligation”. At its simplest, who pays when things go wrong? Look for ‘Liability’ Clause in the Terms and Conditions or in an agreement. It may indicate ‘sole’ liability or ‘joint and several’ liability. If it’s the former, it may mean that your institution is solely liable (responsible) for whatever follows. However, if ‘joint and several’ liability is mentioned then it may mean that all parties are equally responsible. Take for example in an application for funding where there are four partners, all are equally responsible even though they may have received unequal amounts of funding. In addition, does joint and several liability specifically cover technical liability (i.e. for delivery of the project outcomes) or financial liability or both?
- **‘Cap’ or financial limit on liability**- put simply, how much do you pay if certain things go wrong? This can be difficult to ascertain but is very important to know. It is an express limit on the amount you are liable for under the agreement. Often you will see this as “once/twice amount funding received”. If it is not mentioned then there may not be a cap or limit on liability, which is not an ideal situation.
- **Legal obligation or Liability not limited just to a ‘Liability’ clause but extends to following clauses:**
 - **Warranties, Guarantees** – promise to do something or guarantee what is. You need to understand what you are promising or what you agree to have in place. For example, you may be asked to warrant that all Intellectual Property (IP) being brought to the project is free from third party claims. This may be impossible for your institution to do with limited resources.
 - **Indemnity** -Cover another party’s loss. This is an important clause and you should understand what is being asked. You will need to seek additional expert advice about this, usually from your institution’s insurers.
 - **Insurance** clauses – as above, you will need to seek additional advice from your insurers as to the type of insurance cover and the limit of the cover.
- **Intellectual Property (IP) Ownership:** Who owns the Intellectual Property arising from the project (Foreground or Project IP). Does the funder require that all IP generated is assigned or owned by them? Is this in conflict with your Institution’s IP Policy?

- **Force majeure clause:** *“Certain events, beyond the control of the parties, may inhibit the parties from fulfilling their duties and obligations under project agreements. To avoid the resultant breach of contract, parties may prefer to excuse contractual obligations to the extent that they have been so inhibited.”*¹ Check if there is a Force Majeure clause and also what events are included. Be aware of the process that is implemented in the case of Force Majeure. If possible, ensure there is a full ‘Force majeure’ clause – well defined e.g. covers strikes, situations over which you have no influence. This reduces liability where normally failure to deliver under these circumstances would be deemed a default.
- **Dispute Resolution Clause.** Is there a dispute resolution process or ADR (Alternative Dispute Resolution) process mentioned? Is the decision binding and confidential or not?

Final Checklist

How do I make a decision to submit an application or sign acceptance? Who should I talk to about it?

1. You need to analyse risks for the project being undertaken; these involve knowing the nature, subject, and sensitivity of project. You must speak to the researcher to gain a complete picture of what is to be undertaken, especially if a partner. You need to understand Intellectual Property provisions and discuss these also with the researcher. Consider if a simple ‘Risk Assessment’ may need to be completed and decision documented.
2. **It is critical to know your institution’s position on**
 - cap on liability;
 - insurance limits for various policies; (e.g. Professional Indemnity, Employers liability etc.)
 - Providing indemnities
 - Dispute Resolution: Do you know your institution’s position? Does it prefer to go directly to courts or to follow an ADR process?

If there is no position on the above, then it is advisable that you raise the issues with the responsible authority and find out.

¹ <https://ppp.worldbank.org/public-private-partnership/ppp-overview/practical-tools/checklists-and-risk-matrices/force-majeure-checklist>