

Draft, for discussion purposes
Principles of Cooperation

Introduction:

The Dutch government has granted the Foundation 'GroenvermogenNL' proposal 383 million Euro from the National Growth Fund. With this subsidy, GroenvermogenNL will make a substantial contribution to the upscaling of climate-neutral hydrogen and the application of green electrons in energy-intensive industries via four instruments; R&D program, pilot supports, Demo support and Human Capital Agenda. The R&D program consist of seven work packages (WPs); 1) Making carbon-neutral H₂, 2) Transport & Storage of H₂, 3) Direct use of H₂, 4) H₂ & green e for C-based chemistry, 5) H₂ & green e for N-based chemistry, 6) green H₂ & e for specialties and 7) Socio-economic aspects & implementation of H₂, all together hereinafter referred to as the **"Total Project"**. For each work package, a consortium is formed during two workshops over several days. Research institutes and business and civil society organizations applied for attending the workshops via a NWO call for proposal for work package 2 (Transport and Storage of H₂) hereinafter referred to as **"the Project"** .

As a starting point a Grant from NWO is subject to the NWO Grant Rules 2017 (v.2019) as well as to any further conditions set out in the Brochure (Call for Proposals). Grants from NWO to enterprises are allowed on the basis of the General Block-Exemption Regulation (EU/2014/651 (AGVV)) as well as the Commission Communication 2014/C 198/01 (Framework for state aid to research, development and innovation (Europese kaderregeling)), among which Art. 28 a-d and Art. 29 thereof.

Before starting the Project, all parties taking part in the Project, hereinafter referred to as **"Participant(s)"**, need to enter into a cooperation agreement for the Project, herein called the **"Cooperation Agreement"** or **"CA"**. **This applies to all work packages for which a project is started under the Total Project.**

In order to accelerate the process of coming to a CA between the Participants, GroenvermogenNL has laid down certain principles (**"Principles"**) that she high recommends to apply for each CA for each

The Principles address the following subjects:

- The terms IP, knowhow, Background and Foreground;
- Ownership of Background and Foreground IP, including joint ownership;
- Access to IP and know how (both Background and Foreground) of other Project Participants and the conditions related to such access/use and a more detailed arrangement regarding Background and Foreground being software;
- An additional principle regarding the position of affiliates in this respect
- A Participant leaving the consortium at its own preference or as defaulting party
- Dissemination
- Other arrangements of a CA, such as governance, financial aspect and liabilities.

PRINCIPLES OF A COOPERATION AGREEMENT :

IP and Know How; Background and Foreground

- 1) Know-How** is defined as any and all data or information (tangible or intangible) of a Participant, whatever its form or nature, including any IP.

So this in practice any information available to a Participant to the project that may be relevant to and or resulting from, the Project

- 2) IP (Intellectual Property)** is defined as any patents, patent applications and other statutory rights in inventions, as well as copyrights (including without limitation copyrights in software), registered design rights, applications for registered design rights, unregistered design rights and other statutory rights in designs and other similar or equivalent forms of statutory protection, but not trademarks.

This should speak for itself. The carve out for trademarks is done in order to avoid any Participant assuming to get access rights (a license to use) regarding another Participant's trademarks as Background (see next definition).

- 3) As Background** is considered: all Know-How, including IP that is

(i) owned by a Participant or that a Participant has a right to license, prior to the starting date of the CA; or

(ii) developed or acquired by a Participant in parallel with, but independently from, the work performed in the Project.

Item (i) refers to the know-how and IP with respect to which a Participant has ownership or control already prior to the start of the Project. Item (ii) refers to know-how and IP that is generated in the same period during which the Project runs but which is not developed in relation to the Project. Especially larger organisations can have more development projects running simultaneously. This part (ii) is often also referred to as "sideground".

- 4) In the CA (in an Annex)** the Parties must clearly indicate which part of their Background they will make available for use in the Project ("**Available Background**"). Participants can add, but not delete, their Background from the Annex without the consent of the other Participants.

A Participant does not have to make all its Background available for the Project. It can make that choice itself. Once Background is made available for the Project by a Participant, it cannot draw it back without the other parties' consent, as others may have already be working with it in the Project or even decided to join the Project because such Background would be part of it. So called sideground can always be added to the Annex, but this is never an obligation.

- 5) Foreground** is all Know-How, including IP that is not Background, often also referred to as the Results. As soon as a Participant considers Foreground protectable under any IP protection law, it must notify all other project Participants thereof

So Foreground is all know-how and IP that results from the Project only. Each Participant should keep the others informed of its consideration regarding filing legal protection for any Foreground.

Ownership of Background and Foreground IP, including joint ownership

- 6) **Background is**, and will always be, **owned by** the Participant owning and/or controlling it and making it available to the Project, unless such ownership or control is transferred on the basis of a separate agreement between the owner and the receiver.
- 7) In case of such transfer to any party (Project Participant or third party) the Access Rights (see further down) granted to the other Project Participants must at all times be safeguarded and respected.

NB: The following point, item 8 and 8(a), refers to the apportionment (distribution) of IP Rights to Foreground.

GroenvermogenNL has chosen that the Project Manager is in charge of this process. This leaves a choice between two models:

Model 1: 4.2.4.3 (i) .. *The apportionment of the IP Rights to the Foreground will appropriately reflect the distribution of tasks, contributions and respective interest of the Project Participants and any Users, or*

Model 2: 4.2.4.3 (ii) *the IP Rights will be vested in the employer of the researcher who has made the invention.*

This choice has to be made by the Participants, while the Project Manager is in charge of this process. However, as in this case also companies are joining the project, Model 1 requires a, possibly very long, discussion on the extent of a Participant's contribution as well as on whether, and to what extent, a Participant's interest in the Foreground should determine his/her ownership rights to such Foreground. Therefore GroenvermogenNL recommends to use Model 2 for item 8 and 8(a).

8) Foreground is owned by the Participant(s) that created it.

- (a) In each case where Foreground is generated by two or more Participants ('employees), they shall jointly and, unless otherwise agreed in the CA, equally own the Foreground if it is not possible to:
 - (i) establish the respective contribution of each Participant; or
 - (ii) to separate their respective contributions for the purpose of applying for, obtaining or maintaining their protection.
- (b) Joint owners shall each have the right to use and exploit the jointly owned Foreground at their own discretion, (**Option 1**;) without any obligation to account for, or share any profits resulting from such exploitation with the other joint owners (**End Option 1**) (**Option 2**;) upon written notice to the other joint owners and against a fair and reasonable compensation (**End Option 2**). Such exploitation include the right to grant licenses , but not exclusive licenses.

A choice has to be made here between Option 1 and 2

9) Joint Owners shall further enter into a joint ownership agreement between them which shall, in addition, at least include an arrangement on:

- (a) if, how and where the joint Foreground will be protected, including issues related to who takes the lead in filing protection, who pays the cost of protection (*patent*

filing and examination fees, renewal fees, prior use searches, infringement actions, etc), and whether or not to share revenues or profits.

- (b) What are the rights of joined owners not joining the filing for protection in any country or area?
- (c) Dispute resolution between them.

10) Access Rights means the right to use the object of such rights (Background or Foreground IP or Know-How) for the project or, as the case may be, for education, internal research or exploitation, either royalty free or against a certain royalty payment.

11) Access Right to (available) Background

- A) For the Project**, each Participant shall have the right to use the other Parties' (Available) Background to the extent required for carrying out such Participant's tasks under the Project, and at no cost
- B) For exploitation** outside the Project, each Participant shall have the right, upon request, to use the other Parties' (Available) Background to the extent required to apply its own Foreground in exploitation, against fair and reasonable conditions, which conditions may depend on such Participants' own contribution in general to the Project and to the Foreground concerned specifically.

"its own" prevents that a Participant could require access rights to Background of another Participant to use the Foreground of yet another Participant, even without having created any Foreground itself.

- C) Optional: For non-commercial research and teaching purposes**, each Participant shall have the right upon request to use the other Participants' (Available) Background at no cost.

The **optional** wording, can be inserted or not.

12) Access Rights to Foreground

- (A) For the Project**, each Participant shall have the right to use the other Parties' Foreground to the extent required for carrying out such Participant's tasks under the Project at no cost.
- (B) For non-commercial research and teaching purposes**, each Participant shall have the right to request the use the other Parties' Foreground at in such case no cost.
- (C) For exploitation** outside the Project, each Participant shall have the right, upon request, to use the other Parties' Foreground to the extent required to apply its own Foreground in exploitation (Option 1) at no cost (end Option 1) (Option 2) against fair and reasonable conditions, which will depend on such Participants' own contribution to the Project, in general, and to its own Foreground to be applied, specifically,.(end Option 2)

Access Rights to Background and Foreground being Software

13) In case a Participant has access rights to **Background that is Software** on the basis of the CA, either for the Project or for exploitation, access to such Background will only be provided in object code form unless otherwise agreed between the parties

concerned. These access rights exclude the right to grant sub-licenses other than to affiliates of the access rights receiving Participant.

14) In case a Participant has access rights to **Foreground that is Software** on the basis of the CA, either for the Project or for exploitation, such access rights include a worldwide right to perform, to make or have made copies, to modify or have modified, to develop, to adapt the software for research, to create/market a product/process and to create/provide a service.

Where such use of Foreground Software requires and API, such access rights include such API, and if a Participant can show that the execution of its tasks under the Project or, as the case may be, the exploitation is technically impossible without access to the source code, access to the source code is provided to the extent required for the Project or the exploitation. Any such type of access may be reflected in the fair and reasonable compensation to be determined.

These access rights to Foreground Software exclude the right to grant sub-licenses other than to affiliates of the access rights receiving Participant.

15) Open License Terms

If (Available) Background might be made available in the form of software that is subject to open license terms, an arrangement should be included that (i) makes all Participants aware thereof, (ii) makes clear what the consequences of such open license terms are for Foreground being developed and (iii) give them the right to object against such software being included in the Project.

16) Position of Affiliates

The CA must contain a definition of affiliated companies!

If a Participant has access rights it also has the right to grant a sub-license under these access rights to its affiliated companies, in which case the affiliated company shall be bound by the same obligations as the sublicensing Participant, such as, but not limited to, obligations of confidentiality. The sublicensed access rights will terminate when the access rights granted to the sub-licensing Participant terminate for any reason. They will also terminate when the affiliated company no longer fulfils the requirements of being an affiliated company.

17) Termination of a Participant

Each CA must contain a provision regarding termination of a Participant as party to the CA, both in case a Participant wishes to leave the consortium and in case a Participant is in default and the other parties wish to terminate the CA for that Participant. Such provisions must also contain arrangements regarding the continuation and termination of access rights granted to and by the leaving non-defaulting and defaulting Participants and other consequences thereof.

18) Dissemination of Results (including publications)

In case a Participant wishes to make any results public through open disclosures, publication in a thesis or otherwise, or other dissemination (hereafter "Publication"), it must first submit any proposed Publication to the other Participants in writing at

least 45 days prior to the planned Publication. The other Participants may make their objections, if any, against publication within 30 days upon receipt of the proposed Publication. If no such objection is made within these 30 days the Publication is permitted. An objection is considered justified and the proposed Publication cannot be issued unchanged or at the planned time, if:

- protection of Foreground or Background of the objecting Participant is or can be adversely affected, or
- the proposed Publication includes confidential information of the objecting Participant, or
- the objecting Participant's legitimate interests would be significantly harmed.

An objection shall include a precise request for change or delay of the Publication and the objecting Participant and the Participant proposing the Publication shall in good faith cooperate to take away the objecting Participant's concerns. The objecting Participant shall not unreasonable continue its objections.

19) Further requirements

- a) Each CA must contain provisions arranging the governance of the Project, including at least appointment of a Project Leader and a Technical Manager and their tasks and responsibilities;
In additional the Participants may consider to add provisions at their own preferences and requirements regarding:
 - Reporting to the Project Leader by the (other) Participants;
 - Reporting by the Project Leader to GroenvermogenNL and NWO
 - Meeting frequency and convocation rules
 - Voting rules
 - Voting rights and possibly veto-rights of Participants in such meetings
 - Voting on declaring a Participant a defaulting party
 - Etc..
- b) Also rules should be adopted regarding the financial aspects of the project, including at least:
 - Payment by the Project Leader of funds received from NWO to the other Participants
 - Consequences of a Participant leaving the Project both voluntarily and as a consequence of breach (defaulting party)
- c) The Parties should further agree on liability amongst themselves and to third parties, as well as limitations in amount and in type (e.g. consequential damages etc.) of liabilities.