

**Legal Issues related to the development, rollout and exploitation of
Living Labs**

Field Operational Test (FOT) programmes are large scale testing programmes aiming at an assessment of the efficiency, quality, robustness and acceptance of new products and services in a real environment.

On the one end, a FOT requires the roll-out (and possibly a prior development) of a technology platform necessary for the tests of the specific product or service whereas at the other end the specific tests have to be defined and executed by a group of selected test-persons and the results achieved will have to be interpreted.

FOTs have become a tool for public authorities in support of their innovation policies. Most of European public authorities have broadened the scope of their policies by including the last phase of the product development in the field of innovative activities that can receive public support and FOTs are an element thereof.

From a legal point of view FOTs require extra answers: compared to more classical forms of R&D co-operation some extra layers are added increasing the complexity of the legal issues. This stems both from the type of work undertaken, (i.e. the development, roll-out and exploitation of the platform) as from the type of results achieved (i.e. the data obtained with the tests of the product or service).

This article only deals with those specific questions related to the FOT. The more general legal issues that are common to FOTs and other forms of R&D projects have been thoroughly analyzed before and need of course to be taken into account when setting up an FOT in order to ensure that this consortium is organised efficiently.

These specific questions will be divided in four categories that will be further discussed:

- Questions related to the organisation of the FOT
- Questions related to the physical platform
- Questions related to the intellectual property rights
- Questions related to the organisation of the test panel

1. Organisation of the FOT

FOT's will be set up by consortia and every practitioner in innovation has experience with the organisation of R&D consortia. The issues related to the reporting, decision-making process, intellectual property and liabilities are well known.

But there are some extra legal issues.

The first is whether a separate legal entity should be created.

If the infrastructure that is developed is important and the intention is to exploit it for a certain time, a separate legal entity could be envisaged. However, the experience learns that this option is not the common one and parties involved tend to work with the more familiar consortium structure.

It will however be required to have a practical daily management structure in place. More than is the case in other R&D consortia contracts with third parties, i.e. with customers and test-persons, will have to be entered into and the power to sign these agreements is best given to the coordinating party.

The second specific element requiring extra attention is the composition of the consortium. The notion of a FOT contains an element of openness that might be underlined by the public authority supporting it: new member should be admitted more easily and once the platform is up and running it should be made available to third parties who want to use it for a test of their own products.

In the consortium agreement (CA) for a FOT the decision making process for the admission of new members should therefore be foreseen but most importantly a procedure for the acceptance of clients for the platform should also be included.

Who will decide about this acceptance?

If a General Assembly of the consortium members is foreseen it is a common practice to give this organ the power to decide upon the admission (and exclusion) of consortium members and special majorities might be required for such decisions. But is this the best level to decide if the FOT will be an open platform and the aim is to have a great number of users for it? If this is the case (whereby these new members can be almost considered customers of the platform) a lower level may be better suited.

Different types of membership?

Not every customer should be a full-fledged member of the consortium. If its role is limited to this of a customer using the infrastructure of the FOT without participating in its development or exploitation, this third party should be granted the same rights. It will probably not ask for them either... .

Can a member claim some form of exclusivity thereby excluding competitors?

New products and services are the core of the competitive position of a company and a company will not be willing to share any experience obtained during the testing phase with its competitors. Whether a FOT is the most efficient way to test a critical product or service is a question that the company involved needs to answer but once it accepts it, it might try to limit the risks involved.

Excluding competitors may seem in contradiction with the very essence of a FOT but some of them are very specific and are even set up by major companies and their suppliers or customers for specific (line of) products. Other FOTs have a more open character. The limitation of access to a specific FOT will depend on the type of the FOT involved but the issue will have to be dealt with. Competition law and state aid regulation will of course have an impact here.

2. Development, rollout and exploitation of the FOT

For FOTs where the platform requires extra development work part of the work-programme will be similar to other R&D projects, at least for this development part of the programme.

But there are other aspects that need to be covered: delivery, acceptance, warranties and liabilities are different from a mere R&D project. A “physical” platform will be delivered in most cases and the legal terms governing this delivery will be much closer to a contract for the delivery of goods and services than to the CA normally used for R&D.

Some form of obligation of result will be required in order to allow a successful start of the FOT.

The ownership of the platform is another issue.

If no separate legal entity is incorporated the consortium will have to agree upon the party owning the platform. If only one party is contributing to it, the easiest solution is of course to allow this party to keep the ownership of the elements it contributed. However, the reality is seldom that simple and several parties will have to co-operate in the set-up of the FOT. Ownership of the separate elements by the different parties having contributed it is then an option. This might be preferred over a co-ownership of the platform as a whole by all parties involved as co-ownership is seldom a workable solution. Not that the alternative is free of defects: to manage the risks involved and the related insurance policies will be a challenge for any prime contractor having the responsibility for it.

This is valid for the whole exploitation phase. The members need to agree on responsibility for the specific task related to this exploitation and to give sufficient freedom to the management allowing an efficient exploitation. The relationship between the management of the FOT and the assembly of consortium members is not very different from the internal situation in any company and need to be organised likewise.

As said above the power to commit the FOT or, lacking legal personality, the other consortium members needs to be defined differently: the management will need a real power to enter into agreements with clients and test persons that is wider than what is normally granted to a prime contractor in an R&D consortium. These powers should of course remain limited to the daily management of the FOT and a balance will need to be defined.

Another thorny issue, though not strictly legal, is the price setting for the use of the platform.

Parties having contributed to initial investment will of course want to see this contribution reflected in the price they would have to pay for their use of the platform. But prices charged to third parties will have to reflect the overall cost structure of the FOT. This is not only required from a sound business point of view but the non-discriminatory and economically acceptable price might be imposed by the funding authorities. Here again, state aid rules might come into play if the prices charged could be seen as a form of government subsidy for the companies using the FOT.

3. Intellectual Property Rights

The division of intellectual property rights and the grant of user rights on pre-existing IP (Background) and results (Foreground) is always organised in some detail in any CA. The rules applicable in the different Framework Programmes of the European Union have thereby become a source of inspiration and, for some, even a source of customary law.

But here again, a consortium for a FOT cannot limit itself to this standard CA and will have to add some specific stipulations.

With respect to the Foreground these are twofold.

The first one is obvious: in the development phase of the FOT results can be achieved too and the intellectual property rights are therefore a question to be discussed. However, normally the scheme used in the FP CA's can be used and no specific clauses dealing with this type of Foreground are required. However, it is worthwhile to discuss this in some depth within the consortium to avoid any misgivings during the later phases of the FOT, i.e. when delivery of specific elements is required.

A solution for the second question should anyhow be included in any CA for a FOT: How to deal with the test results achieved while using the platform to test a specific product of service.

Whether this products or service is owned by a consortium member or not will not make any difference here; each user will want to see the (test-) results achieved as strictly belonging to it and will not be willing to share these results with any other party. The results are so critical that the owner will not be willing to share them with others and certainly not to grant any user rights on them.

The classical scheme whereby the party having developed it owns the Foreground and whereby this party has to grant limited user rights on its Foreground is therefore no longer adapted to these test results.

The most straightforward solution is to define a different category of Foreground, Test Results, and define the rights on these results separately in line with the commercial value these have for the owner. The owner of the product or service being

tested will of course own the Test Results but there will be no obligation at all to grant any user rights on these commercially sensitive test results.

But what if the use of the FOT leads to product improvements or even, in a very successful but probably less likely case, to the development of a new product ?

The consortium will have to decide beforehand whether it will apply the classical “Foreground” scheme or the specific “Test Result” scheme to this situation. In most cases the latter seems to be advisable: we are unavoidably at the end of the product development cycle and to impose the sharing of any result achieved at that stage is not obvious. The attractiveness of the FOT to potential users will also increase if their complete exclusivity of any successful development based upon the use of the FOT is guaranteed.

4. Test Panel

For the execution of the tests a test panel will have to be selected and monitored and raw data will have to be processed and probably interpreted.

These tasks require a specific knowledge and the party bringing in this expertise will want to see it protected and valorised correctly. Once again, this might require adaptations of the more classic CA to take into account the protection of this form of Background. The owner of it could be less inclined to share it with the other consortium members.

But there is more to it as the relationship between the FOT and the test panel requires specific agreements.

A preliminary remark here: we are leaving the field of commercial law and we cross the border of the civil law (droit civil, burgerlijk recht) with its own rules. These are different with respect to the rules of validity and evidence of contracts and the legislation protecting consumers will also come into play. What are needed are well-known contracts but the environment in which these will be used might therefore be different.

For obvious reasons the test person will have to accept a non-disclosure obligation but the implementation thereof will be not that easy. If we look at the situation whereby a test user is invited to test new equipment in his household it will be difficult to ask him not to disclose his participation in the FOT. An adapted version of the standard Non Disclosure Agreements the consortium members are using is therefore preferable, adapted to the specific situation.

The same is valid for the conditions under which products are made available. Products will normally be made available under a loan agreement that will need to clearly indicate the terms and conditions applicable. In the relationship with a consumer no implicit rights or obligations should be assumed and even obvious dispositions should be in writing.

It should of course be made very clear, i.e. in a written document signed by the test-person, that the product or service is a test device or service and that no guarantee for its proper functioning or replacement is offered. The liability of the owner of the product or service needs to be defined properly as well whereby it should be kept in mind that policy insurances for this type of loan might not be readily available.

This scheme might create a rather complicated situation for the test user and the consortium member should make unequivocal arrangements on how to deal with it. It goes without saying that the number of contracts with the test user should be kept to a minimum. As said above this should be reflected in the organisation of the consortium by granting the required powers to the prime contractor or to the party responsible for the management of the test panel.

Finally, as a FOT will in most cases work with a database containing elements covered by the national privacy legislation, the members of the consortium will have to apply the privacy protection rules contained therein. Here again it is advisable that one party is made responsible for it, preferably the party that will ensure the liaison with the test panel.

Conclusion

From a legal point of view FOT create the risk of becoming a complex environment that is difficult to manage. The common organisation of R&D consortia is not adapted to the extra issues that arise when setting up a FOT.

Pragmatism can be the starting point for a sound legal organisation but this pragmatism cannot replace the need for an in-depth analysis of the role and expectations of all parties involved and of the translation thereof in the required legal documents.

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