Public consultation on the revision of the Framework for State aid for research and development and innovation ("RDI Framework")

Submission of Aalto University and University of Helsinki to DG Comp-Unit H2 (HT.5967)

We welcome the Commission's intention expressed in the Commission's explanatory note to clarify and improve the state aid rules for Research, Development and Innovation. However, the draft for the RDI Framework does not address the major ambiguities.

Paragraph 1.1/ 11: The combination of the EU funding with the national state funding

This paragraph fails to specify how state aid laws will be applied in Horizon Europe and EIT-projects in which the EU funding covers only 25% of the indirect costs and as a result typically 20-30% of all costs are funded by national state funding in Horizon Europe and EIT educational projects and 40-50% of all costs in EIT innovation projects. It is unclear whether the obligations of the research organisations ("ROs") not to be a source of state aid are modified or restricted when they are partly funded by EU resources.

This paragraph combined with the Grant Agreement for Horizon 2020 -projects allowing on an ex ante basis royalty-free access rights as an option without regard to the actual contributions or actual market prices of the intellectual property rights ("IPRs") of each partner or involvement of the national state funding in the generation of such IPRs has caused some industrial and academic partners to conclude that state aid laws do not apply to Horizon 2020 and EIT-projects in case they are funded with the EU funding in combination with the national state funding.

In practice the commercialization of the results of Horizon 2020 -projects is very difficult due to the terms of the Grant Agreement relating to granting exclusive licenses (subject to the consent of all participating undertakings) and to transfer of ownership of the results (subject to retaining the non-exclusive licenses for other participating undertakings).

It is not satisfactory that these ambiguities are clarified unofficially in other documents published by the Commission, which may be hard to find.

Paragraph 2.1.1/ 22: "Ancillary activities"

It is acknowledged in the Commission's publication entitled "FITNESS CHECK of the 2012 State aid modernisation package, railways guidelines and short-term export credit insurance" (p.125) that "According to the indications in Section 5 and Annex 8, a very limited number of provisions cause a disproportionate administrative burden (e.g., the notion of ancillary economic activities included in the RDI Framework"

However, this paragraph fails to specify whether the various conditions for ancillary activities are cumulative or whether some of them are alternative to each other. It is unclear how an

economic activity can be "necessary" or "intrinsically linked" or "directly related" to non-economic activity.

This paragraph contains burdensome and complex rules which are difficult for the ROs to use and to prove that their economic activities are ancillary. Capacity issues which combine the availability of personnel and equipment are difficult to evaluate. It is not clear how a RO could implement the requirements and, in particular, how it might prove that the economic activities "consume exactly the same inputs (such as material, equipment, labour and fixed capital)".

The RDI Framework does not indicate what is "the relevant entity" or how the overall capacity can be defined. It is unclear what may constitute 20% of the same input, e.g. in case of multiple inputs of material, equipment and labour or within each class of input, e.g. in case that one equipment is only used for economic activities and the other equipment is only used for non-economic activities in the same laboratory.

It is not so clear what ROs are supposed to do with respect to the monitoring, e.g. should the monitoring ensure that the ancillary activity is linked to the non-economic activities of the RO or should the aim of the monitoring be simply to prevent ROs from setting up commercial consultancy operations under the pretext of carrying out ancillary activities?

It is not satisfactory that some of these ambiguities are clarified unofficially in other documents published by the Commission, which may be hard to find.

Paragraph 2.2.2/ 30-32: "Collaboration with undertakings"

Most of the non-cumulative conditions provided in paragraphs 30-31 of the RDI Framework, either are irrational (such as the participating undertakings bearing the full costs of the project) or require administratively burdensome and costly procedures which are not a common academic or industrial practice (such as requiring an open, non-discriminatory procedure or an independent evaluation or providing the right of first refusal to the undertaking when the RO has more advantageous offers from third parties for the generated IPRs).

In paragraph 31d) it could be difficult for the ROs to receive any such offers from third parties, when the first right of refusal is known to the third parties. The market price for IPRs will depend on the scope of the rights assigned or licensed and on the resources of the undertaking concerned (including its existing IPRs) to exploit IPRs concerned, e.g. whether they may be exploited in its all products globally or in one product on the home market. The market price for IPRs for an undertaking is not necessarily the same as for any other undertaking.

In practice the market price is usually agreed in the negotiations between the RO and the industrial partner as described in the Commission's decision and the subsequent judgment of the General Court in **SA.27187: Software licensing agreement between the Technical University Delft and Delftship BV [NL].**

In the publication by the Joint Research Centre (JRC), the European Commission's science and knowledge service in 2021 entitled "Strategic evaluation of the Bulgarian Centres of Excellence and Recommendations for their further development" (p.66) it is acknowledged that "Most of these conditions set by point 28 are clear. **Condition (c) is not and often leads to questions**."

The Commission has replied to Sweden's question as follows:

Question 6 – joint ownership
In some projects, the industry partners do not contribute as much as the universities does (taking into account work packages and contributions as set out in article 28(c)). If the university has generated an IPR jointly together with one of the industry partners in such a project, does the Commission consider that there is no State Aid if both joint owners in such a project grant a royalty free right to the other joint owner to use and commercialize the jointly owned result? Is the answer different depending on whether the university has generated e.g. 20%, 50% or 90% of the IPR?

Question 6 : The Member State has to bear in mind that point 28 of the RDI Framework provides for several (non-cumulative) conditions in order to ensure that no indirect State aid is provided to the undertakings participating in collaboration with research undertakings. In the situation where the industry partners have not equally contributed to the project and are granted a royalty free right to use and commercialize the jointly owned result and if no other condition set out in point 28 is met, then the industry partner will be considered to have enjoyed favourable conditions from the collaboration and therefore indirect State aid."

Consequently, this would also apply to any IPRs solely owned by a RO. In view of the above reply and the footnote 37 it is unclear under which circumstances under the paragraph 30(c) the ROs may agree on the sharing their IPRs amongst the other participating undertakings and whether this can be agreed on ex ante basis without knowledge of the actual market prices of the resulting IPRs or of the actual contributions of each participating undertaking.

In a consortium the monetary and other contributions of the participating undertakings are rarely equal and therefore in practice it hardly possible that the same rules would apply to all participating undertakings or that different rules would be accepted to be applied to the participating undertakings in the same consortium.

This paragraph has caused some industrial and academic partners to conclude that under the paragraph 30(c) the participating undertakings may on ex ante basis agree e.g. that all participating undertakings grant to each other non-exclusive royalty-free rights to the resulting IPRs also for economic activities without knowledge of the actual market prices of the resulting IPRs or of the actual contributions of each participating undertaking.

In the paragraph 30 d) it should be clarified that only the contribution of the undertaking concerned (not the aggregate contributions of all participating undertakings) to the IPRs concerned should be reduced.

It is not satisfactory that some of these ambiguities are clarified unofficially in other documents published by the Commission, which may be hard to find. The Member States' questions and the Commission's replies relating to the RDI Framework should be published.

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