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Contribution of the Federation of Austrian Industries (IV) on the "Review of the State aid Framework for research, development and innovation" by the European Commission (1st draft of the EC)

The European Commission is planning a revision of the State aid Framework for research, development and innovation. For this purpose, the Commission launched a public consultation on its website[1] on 8 April 2021. The Federation of Austrian Industries (IV) welcomes the consideration of new current strategic priorities of the Commission, such as the Industrial and Digital strategy and the Green Deal, as well as the inclusion of technology infrastructure as an additional aid element. In general, the Federation of Austrian Industries also welcomes the fact that no cuts will be made in the maximum aid intensities included so far.

In detail

Ad) Pt. 12: Undertakings in difficulty

Due to the COVID-19 crisis, it can be assumed that numerous companies will continue to be in dire economic straits. Therefore, it would be important to also **adapt** the "undertaking in difficulty" provision for the new Union framework for R&D aid for companies in difficulty in order to ensure the international competitiveness of these firms.

Ad) Pt. 14d and 17ll: Technology infrastructure

The additional aid element of technology infrastructure should **also be included in the future GBER**.

It should be noted that the use of technologies via technology infrastructures by external parties (such as SMEs) is not always easy in various sectors, which would exclude certain sectors – such as the pharmaceutical sector – from the outset. It is suggested that appropriate exceptions be made possible so as not to cause any de facto exclusion of individual sectors.

Ad) Pt. 17h), k) r): Definition digitalisation

The inclusion of the term "digitalisation" is very welcome. It is **recommended** that footnotes 17 and 18 be integrated into the main text and that "advanced micro- and nanoelectronics" be added.

Ad) Pt. 22: Use of a research organisation or research infrastructure for economic and non-economic activities; max. limit of 20% economic activity

Monitoring of the ancillary character of the economic activity is intended to be applied for at least 10 years. We **recommend** replacing the restrictive wording "at least" with "at most", as the lifespan of some research infrastructures is shorter (e.g. high-performance computers).

[1] https://ec.europa.eu/competition/consultations/2021_rdi/index_en.html

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Ad) Section 2.2.1: Contract research by research organisations on behalf of undertakings

It should be specified who (undertaking or research organisation) is obliged to prove whether the research organisation carrying out the contract research receives state aid for it.

Ad) Section 2.2.2 Collaboration with undertakings (concerns pt. 29 to 32)

The clauses under section 2.2 are identical to the version of the Union Framework for State aid for research, development and innovation (2014/C 198/01 – "2014 Framework") currently in force. Unfortunately, the 2014 version of the Union Framework, which is identical to the draft 2021 revision, raises a number of open questions, resulting in increasing legal uncertainty. In recent years, both enterprises and research organisations or research infrastructures have become increasingly aware of the risks of breaching Article 107 TFEU. As a result, negotiations between enterprises on the one hand and research organisations or research infrastructures on the other hand have become increasingly inefficient. Moreover, all partners fear to unknowingly breach state aid rules, which may be caused by the unclear rules of section 2.2 (in particular section 2.2.2).

Ad) Pt. 30: Collaboration projects between undertakings and research organisations or research infrastructures.

The Framework regulates in great detail some examples under which a collaboration should not be considered as indirect State aid. Unfortunately, the examples given by the Commission do not reflect the usual practice between undertakings and research organisations or infrastructures.

Subsection a): A situation where an enterprise bears the full costs of a project is not a collaboration in the sense of the definition, but a contract research or research service. Even if such a constellation were an actual collaboration, it is unclear under this point whether it would be allowed to attribute (all or part of) the IPR resulting from such a collaboration to the undertaking.

Subsection (b): allows collaborations where "results of the collaboration that do not give rise to IPRs may be widely disseminated and any IPRs arising from the activities of research organisations or research infrastructures are fully attributed to those institutions". This point leaves open the question whether only the results achieved by the research organisations or research infrastructures are meant or all results of a collaboration. A situation in which an entity is supposed to relinquish its rights to those results generated by the entity (or in which it was involved) is contrary to the rules of a prudent businessman.

Subsection (c): The Commission introduced a new example in the 2014 Union Framework that differs in some respects from the other three examples. While the other three examples have a very clear view of how a collaboration might be structured, this newly introduced example allows for a different weighting of how "their work packages, contributions and respective interests adequately reflect".

Subsection (d): The cost of calculating the market price may be disproportionate to the market price itself. The whole process makes the costs for the company unpredictable and time-consuming.

In all negotiations between undertakings on the one hand and research organisations or research infrastructures on the other hand, there are two central sticking points:

- The question of how jointly developed results can be used: According to most European laws, each co-owner of a patent may use the patent as long as he or she does not interfere with the individual rights of the other co-owners. If such an arrangement applies between an undertaking and a research organisation or research infrastructure, both parties can use the joint invention.

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Due to the nature of its activities, an undertaking has a lot more opportunities to use such a joint invention than a research organisation or research infrastructure. However, it is unclear whether these different opportunities to use a joint invention result in an advantage for the undertaking to which the State aid rules apply.

- The same question arises in the case of the *use of results which were obtained alone*. If a collaboration agreement allows each party to use the other party's results without paying compensation, the research organisation receives the right to use the undertaking's results in return for granting its rights to the undertaking. As a rule, the research organisation or research infrastructure is not able to monetise such results in the same way as the undertaking.
- It is unclear whether the different circumstances in both cases (joint results versus access rights to results) lead to an advantage for the undertaking, or whether the equal rights granted to all partners preclude such an advantage. From the point of view of industry, there is no breach of Art. 107 TFEU if the rights to use jointly produced results or the rights to use all results which were produced alone are distributed equally – even if the research organisations or research infrastructures have fewer opportunities to monetise such access rights. A possible disadvantage for the research organisations or research infrastructures resulting from the fact that they do not have the same possibilities as the companies does not lead to an advantage for the companies. Therefore, State aid rules do not apply in such situations.

The current regulation in the 2014 Union Framework as well as the proposed regulation in the 2021 Union Framework lead to demands from research organisations or research infrastructures which make collaboration between companies and research organisations and research infrastructures increasingly unattractive. With such demands from research organisations and research infrastructures, the investment in a research collaboration is higher for a company than the results from such a collaboration. In the long run, this could lead to fewer collaborations between companies and academic partners.

We strongly recommend specifying the boundaries of permissible and non-permissible agreements between undertakings and research organisations or research infrastructures to minimise the burden of contract negotiations and maximise legal certainty. Thus, **we propose a clear regulation regarding Pt. 30 of the 2021 Union Framework, so that:**

- the use of jointly developed results by an undertaking does not constitute an advantage for the undertaking for the purposed of State aid rules
- the granting of access rights to the results by the undertaking to the research organisation or the research infrastructure is compensation for the access rights granted by the research organisation or the research infrastructure to the undertaking and therefore does not confer an advantage on the undertaking.

In addition, we recommend adapting the text concerning Pt. 30 as follows:

1. Where collaboration projects are carried out jointly by undertakings and research organisations or research infrastructures, the Commission considers that no indirect State aid is awarded to the participating undertakings through those entities due to favourable conditions of the collaboration if one of the following conditions is fulfilled:

(a) the participating undertakings bear the full cost of the project, or

(b) the results of the collaboration which do not give rise to IPR may be widely disseminated and any IPR resulting from the activities of research organisations or research infrastructures are fully allocated to those entities, or

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(c) any IPR resulting from the project, as well as related access rights, are allocated to the different collaboration partners in a manner which adequately reflects their work packages, contributions and respective interests. ~~*or*~~

2. Whilst an agreement as outlined under Point 30 (c) should be aimed for as a priority, in a situation where none of the agreements as described under point 30.1 can be struck, the research organisations or research infrastructures receive compensation equivalent to the market price for the IPR which result from their activities and are assigned to the participating undertakings, or to which participating undertakings are allocated access rights. The absolute amount of the value of any contribution, both financial and non-financial, of the participating undertakings to the costs of the research organisations or research infrastructures' activities that resulted in the IPR concerned, may be deducted from that compensation.

Ad) Pt. 31

In accordance with the recommended amendment in Point 30, the **following amendment** would also be necessary in Point 31:
For the purpose of point ~~*30(d)*~~ *30.2, the Commission will consider that the compensation received is equivalent to the market price if it enables the research organisations or research infrastructures concerned to enjoy the full economic benefit of those rights, where one of the following conditions is fulfilled:*

(a) the amount of the compensation has been established by means of an open, transparent and non-discriminatory competitive sale procedure, or

(b) an independent expert valuation confirms that the amount of the compensation is at least equal to the market price, or

(c) the research organisation or research infrastructure, as seller, can demonstrate that it effectively negotiated the compensation, at arm's length conditions, in order to obtain the maximum economic benefit at the moment when the contract is concluded, while considering its statutory objectives, or

(d) in cases where the collaboration agreement provides the collaborating undertaking with a right of first refusal as regards IPR generated by the collaborating research organisations or research infrastructures, where those entities exercise a reciprocal right to solicit more economically advantageous offers from third parties so that the collaborating undertaking has to match its offer accordingly.

Ad) Pt. 81: Indirect costs
A simplification of the methods for calculating indirect costs is generally welcome. However, in the interest of simplification and equal treatment of funding beneficiaries, the **envisaged flat rate** of 15% **for indirect costs** must be **brought into line with the rate of 25% applied by Horizon Europe and numerous member states** to the direct costs of the R&D project.

Ad) Pt. 101: Transparency

The **transparency threshold should not be lowered to EUR 100,000** in view of the EC's intention to focus the EU on large distortive subsidies and reduce bureaucracy. Such a reduction is understandable for temporary aid frameworks, but not for the generally applicable EU Framework for State aid to promote research, development and innovation. Rather, this limit should be equated with the GBER limit of EUR 500,000.

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