Position paper of Infineon Technologies related to the review of the communication on the Framework for State aid for research and development and innovation

1. General

1.1 This position paper focuses on Section 2.2 (Indirect State aid to undertakings through public funded research and knowledge dissemination organisations and research infrastructure) of the Draft of the Framework for State aid for research and development and innovation ("Framework 2021"). The Clauses under Section 2.2 are identical with the currently applicable version of the Framework for State aid for research and development and innovation (2014/C 198/01 – "Framework 2014").

1.2 As the Commission states in its Explanatory Note, the review process is linked to the issues identified in the fitness check[1]. In the fitness check, however, no specific questions were asked in relation to the different kinds of contract research and collaborations between undertakings and research organisations or research infrastructures[2]. Thus, no evaluation was carried out regarding indirect state aid potentially involved in such types of situations. Unfortunately the Framework 2014 raises some questions in that respect, so the Framework 2021 would have been a good opportunity to provide more legal certainty on some of these issues.

1.3 In recent years, within undertakings as well within research organisations or research infrastructures, the awareness grew regarding the risks of breaching Article 107 TFEU. As a result, negotiations between undertakings on the one hand and research organisations or research infrastructures on the other hand became more and more inefficient (see sec. 2.2 below). In addition, all partners fear to unknowingly breach state aid rules due to the lack of clarity of the guidance provided in Section 2.2 (in particular Section 2.2.2) of the Framework 2014/2021[3].

2. Concerns regarding Section 2.2.2 Framework 2014/2021

2.1 The Framework regulates very detailed some examples under which a collaboration shall not be deemed to involve indirect state aid. Unfortunately in the daily business the examples given by the Commission do not reflect the way business is usually conducted in the daily business between undertakings and research organisations or research infrastructures.

- Subsection a): In practice, a situation in which an undertaking bears the full costs of a project[4] does normally not arise in the context of a collaboration, but is more typical for contract research or research service. Even if such constellation was considered as an effective collaboration, it should be clarified explicitly that the IPR resulting from such collaboration may be (fully) allocated to the undertaking.

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[1] Review of the Framework for State aid for research and development and innovation, https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12777-State-aid-rules-for-research-development-&-innovation-framework-_en

[2] Retrospective evaluation of state aid rules for RDI and the provisions applicable to RDI state aid of the GBER applicable in 2014–2020, https://op.europa.eu/en/publication-detail/-/publication/41003c11-a930-11ea-bb7a-01aa75ed71a1

[3] See also the feedbacks in the course of the preparation: Feedback from Wirtschaftsvereinigung Stahl, https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/2050-Verlangerung-der-im-Rahmen-des-Pakets-zur-Modernisierung-des-EU-Beihilfenrechts-reformierten-Ende%C2%A02020-auslaufenden-Beihilfevorschriften/F253640_de; and Feedback from voestalpine, https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12777-State-aid-rules-for-research-development-&-innovation-framework-/F1446053_en

[4] point 28(a) of the Framework 2014 = point 30(a) of the Framework 2021

- Subsection b): The next example[5] allows collaborations according to which “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”. It should be clarified that this subsection only applies to results generated by the research organisations or research infrastructures. Indeed, a situation in which an undertaking would waive its rights in results which were generated by the undertaking (or in which such undertaking participated) contradicts with the rules for a prudent businessman.
- Subsection c): In the Framework 2014 the Commission introduced a new example[6] which differs in some ways from the other three examples. Whereas the other three examples have a very distinct view on the possible design of a collaboration, this newly introduced example allows a different weighting how to “adequately reflect their work packages, contributions and respective interests”. It should be clarified explicitly that the allocation of IPRs does not need to be agreed before the start of the collaboration, but that the evaluation can also be done after the generation of the results.
- Subsection d): The efforts needed to calculate the market price[7] may involve disproportionately high expenditures compared to the market price itself. The whole procedure makes the costs for the undertaking unforeseeable and time consuming.

2.2 Two issues are blocking points in all negotiations between undertakings on the one hand and research organisations or research infrastructures on the other hand:

- How to use jointly generated results: Under most European jurisdictions, each co-owner of a patent is allowed to use the patent, as long as the co-owner does not affect individual rights of the other co-owners[8]. If such a rule applies between an undertaking and a research organisation or research infrastructure both parties are able to use the joint invention. By the nature of its business, an undertaking has much more possibilities to use such a joint invention than a research organisation or a research infrastructure.
- The same situation arises in relation to the use of solely generated results. If a collaboration agreement allows each party to use the results of the other party without paying a compensation, the research organisation receives the right to use the results of the undertaking in return for granting its rights to the undertaking. Usually the research organisation or the research infrastructure is not able to monetize such results in the same way as the undertaking.
- In our view, the different factual circumstances in both cases (Joint results, vice versa access rights to results) cannot lead to an advantage within the meaning of Art. 107 (1) TFEU for the undertaking as long as the rights are allocated in line with sub-sections a) to d) above (including the proposed clarifications). It should thus be clarified that a collaboration does not involve state aid if the rights to use jointly generated results or the rights to use all solely generated results are allocated adequately, and that it is irrelevant whether the research organisations or the research infrastructures have less possibilities to monetize such access rights. The mere fact that research organisations or the research infrastructures do nothave the same commercial possibilities like undertakings cannot lead to an advantage for the undertakings. Thus, is should be clarified that state aid rules are not applicable in such situations.

[5] point 28(b) of the Framework 2014= point 30(b) of the Framework 2021
[6] point 28(b) of the Framework 2014= point 30(b) of the Framework 2021
[7] point 28(d) of the Framework 2014= point 30(d) of the Framework 2021 and the related point 29 = point 31 of the Framework 2021
[8] René Belderbos, Bruno Cassiman, Dries Faems, Bart Leten, Bart Van Looy, Co-ownership of intellectual property: Exploring the value creation and appropriation implications of co-patenting, https://www.oecd.org/site/stipatents/Session%201.1.%20Van%20Looy.pdf; Arina Gorbatyuk, "The Allocation of Patent Ownership in R&D Partnerships: Default Rules v. Contractual Practices" (2020) 17:1 SCRIPTed 4 https://script-ed.org/?p=3798, DOI: 10.2966/scrip.170120.4

2.3 The way the guidance is currently provided in the Framework 2014 and the proposed regulation in the Framework 2021 leads to demands on the part of the research organisations or the research infrastructures which make collaborations between undertakings and research organisations and research infrastructures more and more unattractive. With these demands the investment required from an undertaking in order to participate in a research collaboration is higher than the results from such collaboration. In the long run, this could lead to less collaborations between undertakings and academic partners.

3. Conclusion

We strongly recommend to define more precisely the borders of allowed and not allowed agreements between undertakings and research organisations or the research infrastructures in order to minimize the efforts for contract negotiations and to maximise legal certainty. We propose a clear regulation in the context of point 30 of the Framework 2021 that:

- the use of jointly generated results by an undertaking is not an advantage for the undertaking in the sense of the state aid rules as long as the rights are allocated adequately (and in line with the above clarifications).
- the granting of access rights to the results by the undertaking to the research organisation or the research infrastructure should be considered as a compensation for the access rights, granted by the research organisation or the research infrastructure to the undertaking, and thus, on balance, no advantage is given to the undertaking.