

Consultation on the review of the Framework for State Aid for research, development, and innovation

Ladies and Gentlemen,

Thank you very much for giving us the opportunity to make suggestions relating to the review of the Framework for State Aid. We would very much appreciate if you would consider the following aspects:

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1.Improving and updating the existing definitions of research and innovation activities eligible for support under the RDI Framework, in particular to clarify their applicability with respect to digital technologies and activities related to digitalisation. This aims at providing legal certainty to Member States and stakeholders, while facilitating RDI investments that will enable the digital transformation of companies in the EU.

1. “Definitions“ – non-commercial and commercial activities

Review of the Framework for State Aid among others aims at clarifying existing definitions of research and development activities and providing legal certainty to Member States and research institutions. For this purpose, some new definitions have been introduced, which refer to special activities, in particular in connection with digitalisation. In our opinion, it would also be desirable to clarify already existing definitions that are used as a basis for all other research activities, because the structures of cases are increasingly different and complex. In par. 27 (draft par. 29), it is regulated in which circumstances an indirect state aid must be assumed by publicly funded institutions to companies for research in the framework of a joint collaboration, especially through the transfer of knowledge, dissemination, and use of research infrastructures. For the negotiation of consortium agreements, especially for the negotiation of provisions concerning the assignment of rights in a collaboration and the granting of access rights, the distinction between commercial and non-commercial activities is of high importance. Nearly all institutions pursue both types of activities. Still, this distinction can be difficult to make precisely in research and development agreements. The intention of making a profit or offering products or services on a given market (definition of commercial activity in e.g. par 17 (draft par. 19)) can not be used as a criterion for some case groups. In particular, purely “internal use” may

apply to both cases (commercial and non-commercial) in our opinion. We would therefore like to suggest to more clearly define what are non-commercial and commercial activities in order to facilitate the implementation of the Framework for State Aid.

In this regard, we would also like to clarify the following aspects:

- Confidentiality of non-patentable results: If the research results remain with the research institution, but are declared confidential, they are actually known by the company involved in the respective project only and this company can then commercially use these results on an exclusive basis. Here, it would be helpful to specify in the definition of effective collaboration 1.3 (i) or 21.A) ii) that such cases imply the existence of contract research / a research service (commercial activity of the research institution) rather than a collaboration.
- Research work is tailored to the company involved, such that the findings are disseminated, but only of economic use for the company involved (e.g. findings relating to the individual products of the company or existing patents that prevent use by other companies): here, it would be helpful to clarify in the definition of effective cooperation 1.3 (i) or 21.A) ii) that such cases represent contract research / a research service (commercial activity of the research institution) rather than a cooperation.

2. “BER” – dissemination of results and assignment of rights

When cooperating with companies in a joint collaboration project as outlined in par. 27 (draft par. 29) of the Framework for State Aid, granting of rights as specified in lit. b is often in conflict with the R&D BER (Block Exemption Regulation). It is unclear whether Article 3 (2) R&D BER is applicable to the provisions agreed upon by the partners. If so, the question is how both provisions can be made compatible.

Applicability of the R&D BER: In view of the reason for consideration (6) of the R&D BER, it might be assumed that the latter is not applicable to such provisions of collaboration projects, as the collaboration agreement contains provisions for the execution of research activities in the pre-competitive phase only rather than provisions on the joint use on the market (e.g. of a mature result) that might represent a restriction of competition. As a consequence, the exemption requirement according to Article 3 (2) R&D GOV does not need to be fulfilled for this collaboration agreement. In case the Commission assumes also that the R&D BER is not applicable to cooperation according to par. 27 (draft par. 29), a clarification in par. 27 (draft par. 29) would be very helpful.

Implementation of the criteria in case of applicability of the R&D BER: If, however, the R&D BER is in fact applicable, all partners would have to be given access to the results from the collaboration project for the purposes of further research and development without any restrictions. In practice, it is often difficult to comply with both the Framework for State Aid and the R&D BER at the same time. Companies often interpret this requirement of the R&D BER as the access to results being unlimited in terms of time and application and cost-free. The wording of Article 3 (2) R&D BER leaves the following criteria in question: cost-free / conditions customary on the market, temporally unlimited, limited to the necessity of using own results. To meet the requirements of the Framework for State Aid, however, such criteria should be defined and included. In our opinion, it would be desirable to clarify this in the regulations in order to provide legal certainty to companies

and research institutions, such that rights e.g. will only be granted against payment customary on the market and be restricted to the subject of cooperation. We would very much appreciate a clarification, according to which the BER requirements only have to be met to the extent specified by the provisions of the Framework for State Aid, in particular par. 27 (draft 29).

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2. Introducing new provisions to enable public support for technology infrastructures (e.g. facilities, equipment, capabilities and support services required to develop, test and upscale technology, such as testing labs) with a view to incentivise RDI investments in this type of infrastructures. This aims at further enabling the swift development of innovative technologies especially by small and medium sized enterprises (SMEs) and facilitating the green and digital transition of the EU economy.

1. “Indirect subsidisation of SMEs” – clarification that an indirect subsidisation within EU-funded projects is no state aid

It is frequently obvious from the funding structure and funding purpose outlined in current EU funding programmes (Horizon 2020 / Europe) that SMEs are targeted by funding, whereas the funds are only awarded to research institutions. It appears in such cases to be the goal of the funding to support research and development of SMEs. The beneficiary, however, is not the SME proper, but the research institution. The research institution is to use these funds to render research services to the SME. To fulfil the purpose of funding, these research services for the SME would have to be cost-free. On the other hand, such research services represent an indirect subsidisation that would have to be approved separately by the Commission or in accordance with the de-minimis regulation. As the latter is rather complicated and, depending on the concrete funding case, impossible for budgetary reasons, we would appreciate a clarification in the Framework for State Aid. This clarification would have to point out that not only the direct EU grant, but also all indirect subsidies effected by such EU grants and implied in the funding structure of the respective EU project/funding programme do not represent state aids. Such a clarification in the Framework for State Aid could be made in Section 1.1 Rn 11. A clarification could also be included in the grant provisions, according to which the SMEs are to be the final beneficiaries of the EU grant by way of indirect subsidisation.

2. “Indirect subsidisation” – paragraph 30, lit. c

Requirement of Paragraph 30, lit. c: it is defined by par. 30 of the draft in which cases no indirect state aid can be assumed within the framework of a collaboration. However, it is not defined in lit. c how non-patentable results are to be allocated similar to IPR or further disseminated. Clarification would be desirable in the form of a provision that complies with the Framework for State Aid for non-patentable results as well and to communicate this accordingly to the companies involved. Moreover, requirements to share / distribute IPR are

not specified to the complete extent in lit. c. Again, a clarification or more precise definitions would be desirable. The requirement to consider the respective interests rather than the shares in the work regularly causes big discussions in practice and the problem that, in deviation from the legislation, the company requests ownership rights to be shifted without paying any compensation. We would therefore like to suggest to delete “and respective interests”.