State aid Registry - Directorate-General for Competition
European Commission, 1049 Bruxelles/Brussel BELGIQUE/BELGIE
Ref.: HT. 618 – Consultation on the draft R&D&I-Framework

17. februar 2014

MINISTRY OF BUSINESS
AND GROWTH
Slotsholmsgade 10-12
1216 København K
Tlf. 33 92 33 50
Fax. 33 12 37 78
CVR-nr. 10092485
EAN nr. 5798000026001
evm@evm.dk
www.evm.dk

The Danish position on the Commission consultation on the draft Union Framework for State aid for Research, Development and Innovation

In response to the Commission "Paper of the Services of DG Competition containing draft framework for state aid for Research and Development and Innovation Denmark has the following comments.

DK support the general ambition of the Commission that the state aid rules for RDI should back up the European 2020 objectives.

The main objective of the reform must be to promote investments in R&D&I to boost growth, employment and competitiveness. R&D&I are at the center of the EU growth strategy, and the state aid rules should contribute to focus the impact and composition of research spending in particular in the private economy.

The aim is to stimulate R&D&I including promotion of demonstration and pilot projects, R&D infrastructures and innovation activities, with the least possible distortion of competition and effect on trade on the single market.

The Danish Authorities find it positive that the Commission draft enlarges the scope for state aid to promote RDI and the legal clarity is furthered. It is in particular important that the provisions still leave room for state aid to promote RDI and reach the objective of investing 3 pct. of EU GDP in RDI and stimulate growth in the economy.

The Danish authorities generally support a coordinated approach and a uniform set of rules to clearly and precisely define the goals and means in which Member States construct aid schemes in the field of Research, Development and Innovation. The rules should therefore be simple, user-friendly and easily applicable.

In light of this the Danish authorities can overall offer its support for the main objectives put forward by the Commission in this draft.

Specific comments
As a preliminary remark the Danish authorities would like to emphasize that any impact-assessment made in relation to the proposed provisions would only fully serve its purpose, if it is conducted and made available to Member States before the final adoption of the guidelines.

State aid to research infrastructure
The Danish Authorities have concerns relating to the provisions for investment aid in research infrastructure.
We believe that there need to be a general exemption for investments and public support for common European research infrastructure and research projects defined by their common European interest.

Secondly we believe that the rules for public funding of research infrastructure in the public domain, which are being provided for the use of the academic scientific community as well as for the use of private undertakings, are too restrictive. We believe it should be possible to fund such infrastructures up to 100 percent if the infrastructure is open for use of all interested parties including public scientific institutions and private undertakings. Furthermore private undertakings using the infrastructure must pay the market price for the specific research or testing service they obtain. The Danish Authorities consider it too limited to set a limitation of the annual public budget at 15 pct. to be allocated to infrastructures linked to economic activities. We suggest that such a limit should rather not be set. Instead it should be considered to include a requirement that public research institutions, which are operating both non-economic and economic activities, should conduct these activities on separate accounts and separate economies in order to prevent cross subsidization of the economic activities. The economic activities will understandably be based on markets terms and market prices.

**Aid for R&D projects**
The following provision is introduced in paragraph 4:

If the funded projects turns into prototypes or pilot projects that can be exploited commercially any net revenue directly attributable to their subsequent commercial application within the first five years of the project are deducted the eligible costs. Such a deduction can either be carried out in advance, taking into account the discounted value of the net revenue that can reasonably be expected at the time of aid-granting, or subsequently by recovering the discounted value of the actual value of the beneficiary's net income during those five years.

The provision provides two options for such a deduction from the eligible costs:

1. The first being that you five years after the implementation of the project calculate the net revenue, which the project have directly caused by its utilization in prototypes or pilot projects, and deduct that amount.
2. The second being that you make a judgment of the above, before embarking on the project, and deduct that amount.

With regard to the first option We believe that this would not only be ex-
tremely costly for companies to calculate five years after completion of
the project, but that such a statement would not even necessarily be feasi-
ble.

This is because commercial projects often may relate to the development
of sub-elements of prototypes during the process can incorporate
knowledge from a number of other areas that may not have existed at the
time of allocation in the commercialization, which can depend on many
other terms that do not concern the State aid object (eg. marketing, regula-
tion, the national-economy, etc.)

In other words, it can be extremely difficult to unravel when an income or
a cost is directly related to a given project, when so many other factors
come into play. There will consequently also be used a similar amount of
resources both for businesses to unravel, but also for authorities to estab-
lish an administrative framework for such an investigation.

As for the second solution we believe that it is not only problematic for
the same reasons as stated above, but also because research - including
industrial research - by its very nature is very difficult to estimate the re-
results of, and there will be a very great risk that the specified estimate will
turn out to be incorrect.

If it is the Commissions intention to reduce the ceiling for (research) pro-
jects planned to take the form of prototypes or pilot projects, we recom-
end instead to pull a given number of percentage points from the overall
ceiling, and to specify how the research and development of sub-elements
of prototypes or pilot projects are handled.

Public – private research cooperation.
The Danish authorities believe chapter 2.3 should include clear provisions
stating that public-private cooperation on innovation can be conducted
without conflicting with the state aid rules. We fully support the clear
statement in point 32 that it is not state aid, if the public part has procured
the research service based on a tender in accordance with the EU public
procurement rules. We, however, find it too limiting that this is only con-
sidered to be the case if processed as public or limited tenders, as tenders
based on negotiation or competitive dialogue is becoming more common
in the new public procurement directive. Also this needs to be seen in
connection with the new designed form of public tender – innovation
partnership - being introduced in article 31 in the new public procurement
directive. Finally it should be noted that R&D not in all cases are covered
by the obligation to select the private operator by a public tender if there
is no cross boarder impact.
In cases where the relevant public procurement process is not applied the 4 cumulative criteria must be respected in order to demonstrate the market price in accordance with point 33. In this situation it is unclear if tenders based on negotiation or competitive dialogue will be accepted as covered by the criteria. This point needs to be clarified.

The Danish Authorities would ask the Commission to explain and clarify the difference between the criteria in chapter 2.2 concerning private parties’ cooperation with universities and chapter 2.3 concerning private parties’ cooperation with ordering public authorities. The opinion of the Danish authorities is that these rules could be further harmonized and simplified.

In particular it is necessary to clarify the requirements set out in point 27 taking into account that footnote 30 seems to state the opposite of point 27, namely whether the conditions for cooperation and distribution of IP rights should be settled ex ante or not (ex-post?).

The Danish authorities understanding of point 28 us that only one of the litra a – d points must be fulfilled in order to demonstrate that no state aid is involved. Point 28, litra c states that no state aid is present, if the IPR is distributed between the involved parties in the RDI project in a way that sufficiently reflects their workload, (financial) contribution and interest in the project. Would the commission explain, why this provision is not directly transferred to point 2.3 where new conditions are set?.

In accordance with point 28 litra d state aid is not an issue if the public part receives a compensation that corresponds to the market value of the IPR affected by the effort and activities of the public part. In addition it is explained in point 29 that the compensation will be considered as reflecting the market value if the public part can demonstrate that an open tender procedure has been applied or the public authority effectively on arms lengths conditions did negotiate the amount of compensation on the time of the acceptance of the agreement pursuing the objective to maximize the economic upside. It is of no importance according to point 29, litra d if it ex post will become apparent that the invented product, to which the private part gets the property right to, was in fact of a higher value than that estimated. It is not clear why Public procurement procedure is required in point 2.3.

The Danish authorities suggest a fundamental revision of these provision as the logic behind their design seems to be missing while they also seem extremely difficult to understand and apply in practice.

Point 33, litra d, last indent is also difficult to understand and might result
in opening up for gold plating of the private part in a PPI contract.

Finally it should be further clarified, exactly how it would be possible to operate in accordance with state aid provisions without conducting a public procurement procedure e.g. by acting on basis of the criteria in point 28 litra c or litra d.

In summary it is the Danish position that the rules still do not clarify satisfyingly how public private cooperation on innovation should be handled to be in accordance with state aid rules in situations without competition based on public procurement or open advertising. It must be explained why such projects cannot be covered by point 2.2. In addition it is a challenge that tenders based on negotiation and competitive dialogue and innovation partnerships are not accepted as in point 2.3. Finally point 32 and 33 litra d must be clarified.

**Deduction of income from commercial projects**
In the existing rules it is possible to deduct income from commercial projects ex ante. The Commission has been considering to change this into a ex post mechanism taking into account the factual upside of demonstration and pilot projects. Both methods can be applied but the Danish authorities would prefer to keep the ex-ante principle to prevent unnecessary administrative burden.

**The rules on cumulation**
The rules on how to handle cumulation of aid could be further clarified.

**The rules concerning State Aid to research linked to shipbuilding.**
The draft text explains in footnote 6 that the existing rules concerning innovation aid to shipbuilding should continue as are. In general this approach is supported by the Danish authorities. The Danish authorities do, however, have some points to raise:

Ships are mostly innovative in the sense that the equipment built into the ship is innovative (machinery, environmental equipment, electronic devises et. cet.) which is why it should be possible, based on the new guidelines to provide aid for developing maritime equipment to be installed on board a ship considering that the aid is granted to the sub-supplier of the equipment. In addition the definition of costs eligible for RDI aid in annex I seems to limit the existing costs, which can receive aid compared to the existing guidelines for state aid to shipbuilding. The Danish authorities prefer the existing rules. Finally we would prefer a clear explanation of which RDI rules will be applicable to shipbuilding, as it is not quite accepted legal practice only to regulate this in a footnote to a text.
Transparency and website register of national State Aid.

The Danish authorities still see some legal obstacles to the effective functioning of the suggested obligations on website-publication of individual schemes with detailed information of amount, aid instrument and the status and name of the aid beneficiary.

The Danish Government is concerned about the obligation to register and publish detailed information on aid granted in a Web based register of undertakings. This could lead to administrative burdens for businesses and granting authorities and be in conflict with confidentiality laws, in particular concerning tax matters and confidentiality of research. Therefore tax reductions should not be published on the level of each individual beneficiary and cannot as such be made accessible to any interest party without restrictions and without prior user registration. Notwithstanding the fact, that it would be very difficult to pinpoint the exact amount an undertaking would receive in tax-reductions stemming from a particular scheme, any publication, which goes into such detail as suggested and requires the name of the aid beneficiary to be known, would not be possible without serious changes in Danish national law. The same obstacles apply to the suggested reporting obligation.

Again we must make a point of the huge amount of administrative resources involved as well as the financial aspect in the publication and reporting of information on every beneficiary of every scheme.

If Member states must take on this burden, it must be underlined that such a register must be to the point creating better conditions for transparency and mutual control of state aid. In connection hereto it is of the utmost importance that the register be implemented as uniformly as possible in all member States to effectively ensure that the objectives of peer-review and equal treatment are actually fulfilled in each Member State, hereby ensuring the same market terms for all undertakings within the community.

Furthermore there will be a number of practical challenges in a register, including who has the obligation for updating the data, the frequency of updating, the consequences of errors and omissions in the register, the registration of companies’ mergers or are split etc. and most importantly what are the legal consequences if obligations are breached?

We believe the Commission should be quite specific and precise in defining the requirements for the register in order to make national registers uniform and useful. Member States should be allowed at least 24 months to set up and enforce the registers.

regards

Preben Sandberg Petterson
Head of State Aid