Consultation on the draft Union Framework for State aid for Research, Development and Innovation

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The League of European Research Universities (LERU) very much welcomes the opportunity to take part in the consultation on the first draft text of the revised Framework for State aid for Research, Development and Innovation, as part of the Commission’s State aid modernization initiative.

In order to contribute to the consultation process, LERU would like to submit the following remarks based on the paper of the services of DG Competition containing a draft Framework for state aid for research and development and innovation (dated 19 December 2013) and Commission Staff Working Paper Mid-Term Review of the R&D&I Framework (dated 12 December 2012), both as published on the relevant website.

It is duly noted that the Commission has paid serious attention to the feedback provided by stakeholders. By and large, the draft Framework improves upon the current framework. However, the following suggestions are submitted for your kind review.

Section 1.3 - point 15 (ff) “research infrastructure”

Is it the Commission’s intention that the facilities referred to in line one include buildings and similar structures for housing labs/offices etc. to conduct research?

The definition would benefit from clarification in this respect.

Section 2.2.1 - point 26

The paragraph suggests that the IPR involved are provided by the undertaking to the research organization. This appears to be in conflict with the purpose of section 2.2.1. and the fact that by law the IPR comes into being at the employer of the researchers carrying out the work. According to the section this is the research organization. A transfer from the undertaking back to reduce the costs makes little sense. It would benefit the legibility if the paragraph clarifies that the value of IPRs not assigned to the instructor undertaking, may be deducted from the price.
Section 2.2.2 – points 28, 29 & 30

Arrangements concerning intellectual property rights in collaborations between (mainly publicly funded) research organizations (RO) on the one hand and (private) undertakings on the other hand, have to respect the market-test principle. In the proposed framework the application of an individual assessment is now part of the basic conditions (see 28 (c)). Yet, where the other basic conditions (leaving ownership with the research organisation OR offering market conditions) are perfectly applicable in collaborations with only two partners, the “individual assessment”-rule seems more suited for the situation of a consortium where a broad spectrum of potential roles, interests, contributions etc. is more likely. Hence, it might be useful to add the following amendment to section 28 c):

28. Where collaboration projects are carried out jointly by undertakings and research organisations or research infrastructures, the Commission considers that no indirect state aid is granted 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 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

(c) where, especially in the setting of a consortium carrying out the project, 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

(d) the research organisations or research infrastructures receive a compensation equivalent to the market price for the IPR which result from their activities and which are transferred to the participating undertakings. 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.

Furthermore, the possible line of reform suggested in the review (i.e. to include guidance on the establishment of a reasonable margin) was apparently not implemented. This is most unfortunate as the suggestions provided under paragraph 29 a), b) ad c) are simply not realistic for research organisations.

And the generic description under point 30 does not provide guidance to calculate this either. The practice at research organisation would be greatly helped if a costs base alternative to calculate the market price for IPR would be provided, besides other routes as already suggested. In an ideal world the market price would be based on value and not on costs but as the former is usually highly uncertain, people tend to rely on the latter.

Clarification would be very helpful to reduce the friction between research organisations and undertakings which occur today.
Section 2.3 – points 31 and 33

Is it the Commission’s intention that this arrangement (which includes pre-commercial procurement) is also applicable to research organisations which are involved in projects, where such projects are (partially) funded by a government?

Point 33 describes the conditions under which no state aid is granted, even though no open tender procedure is followed. We agree with conditions mentioned here, except the last one (d), second indent. It seems quite inconsistent with the very essence of IPR to state on the one hand that IPR is allocated to the service provider but to require the latter to grant non-exclusive licenses to everyone who asks for this. Also, market conditions for such non-exclusive licenses are almost impossible to establish. We would therefore suggest to amend section 33 d) as follows:

33. In the absence of an open tender procedure, in particular in the case of pre-commercial procurement, the Commission will consider that no state aid is granted to undertakings where the price paid for the relevant services fully reflects the market value of the benefits received by the public purchaser and the risks taken by the participating undertaking, in particular where all of the following conditions are fulfilled:

   (a) the selection procedure is open, transparent, non-discriminatory and unconditional, and is based on objective selection and award criteria specified in advance of the bidding procedure,

   (b) the envisaged contractual arrangements describing all rights and obligations of the parties are made available beforehand to all interested bidders,

   (c) the pre-commercial procurement does not give the provider any preferential treatment in the supply of the final product or service to a public purchaser in the Member State concerned, and

   (d) one of the following conditions is fulfilled:

      - all results which do not give rise to IPR may be widely disseminated, for example through publication, teaching or contribution to standardisation bodies in a way that allows other undertakings to reproduce them, and any IPR are fully allocated to the public purchaser, or

      - the service provider to which results giving rise to IPR are allocated is obliged to grant the public purchaser unlimited access to those results free of charge, and to grant access to third parties, for example by way of non-exclusive licenses, under market conditions.

Section 3 – point 37

Can the Commission clarify in the relevant section whether such a renewal is to be a full assessment and what the criteria are for an aid scheme to fall under this re-notification requirement. This in light of the legal certainty for recipients of aid under such schemes. Recipients will generally want to avoid an ex post revision in the middle of execution such a project. In addition, it would aid recipients if the Commission clarified on what grounds the duration of the approval is based.
Section 6 – point 119

Is it the Commissions desire to include publicly funded research programs of a structural nature in the aid measures referred to in said point? If so this might lead to a complex and costly exercise which only benefits the consultants (independent experts) who carry out the evaluation. It would be beneficial if the Commission could further clarify the applicability of this requirement, other than by the reference to ‘significant market, technology or regulatory changes’.