Object: **HT. 618 – Consultation on the draft R&D&I-Framework**

**Section 2.3. Public procurement of research services**

This is to acknowledge the introduction into the R&D&I Framework of the measures necessary to duly underline the clear separation between pre-commercial public procurement (onerous bilateral and synallagmatic contracts) and State Aid (concessionary of funding schemes).

The clarification introduced subjects pre-commercial procurement (not exclusive and not fully remunerated R&D procurement) to the rules of competition and, by assigning an explicit responsibility to the contracting authority in the planning of the tender, excludes the distortion of competition (on a regional and local basis) and allows for the reinforcement of a single European market.

The clarification introduced is important because it makes it possible to conclude that the legitimacy of the measures contained in the pre-commercial public procurement call for tenders and of the clauses governing the substantial and formal requisites for participation must be verified in accordance with the general principles regarding the contractual activity of the administration.

The reason for excluding pre-commercial procurement from the rules governing public contracts therefore lies in the need to guarantee flexibility to act on the part of the commissioning body, required by the particular nature of the object of the contract. This flexibility of action offered to the contracting authority is not equivalent to discretionary powers, because the contractual activity of a public administration remains subject to compliance with the general principles of the Treaty, specifically with the principles regarding the free circulation of goods, right of establishment, freedom to provide services, non-discrimination, equal treatment, mutual recognition, proportionality regarding the applicability of said general principles also to tenders that do not fall within the scope of application of the EU Public Procurement Directives 2004/18/EC and 2004/17/EC (cf. Commission interpretative communication 2006/C-179/02).

In the measure considered here, it is implicit that the indication of principle is to be applied in all cases, regardless of the source of funding (European Structural Fund, National, local fund or current expenditure etc.) used by the contracting authority for conducting the pre-commercial public procurement.

In this regard, it should be noted that open tender procedures are more necessary with reference to pre-commercial procurement tenders, in the light of the fact that, in this specific case, there is no market offer available to be taken as a reference. The range of subjects potentially interested in undertaking the R&D activity notified by the contracting authority is normally very wide (also extending to subjects not yet present on the market, or set up for the specific purpose, or that carry
out activities in sectors apparently unrelated to the sector referred to in the call, or in any case not previously known).

In addition, the purpose of pre-commercial procurement is to promote the generation of different, alternative ideas and solutions, so as to be able to compare the pros and cons and obtain as exhaustive as possible information from the market on the best way to solve a particular innovation-demanding problem.

An initial deliberate limitation on participation and competition would therefore normally be unreasonable (and distorting for dynamic incentives in the market).

Furthermore, the necessary subjection of pre-commercial procurement to the general principles regarding public contractual activity renders illegitimate any clauses in the call for tenders intended to place geographical restrictions on participation. The only geographical limitation possible – and it is worth remembering this, in the case of (not exclusive) R&D services procurement - regards GPA Parties. With regard to pre-commercial public procurement, the Members States of the EU are not compelled to comply with non-discrimination obligations towards GPA Parties, which are ratified by the WTO agreements for the procurement of supplies. This means that the procured R&D services whose risks and benefits are shared with the service provider and are excluded from the scope of –full- application of Directives do not have to be opened to competition from GPA Parties.

Finally, the clear separation between the pre-commercial phase and the subsequent supply tender is essential in order to allow for the participation (and the growth) of SMEs in order to prevent situations where the market remains blocked, which have a damaging impact on competition.

In this perspective, it is considered that the PCP must, generally speaking, be open and that the requisites for participation must, as a rule, be set at such levels as to encourage maximum participation in the procedure, especially on the part of small and medium enterprises.

The inclusion of an explicit reference to PCP in the new R&D&I Framework coherent with COM (2007) 799, explaining to procurement public authorities the condition under which PCP is something that is possible by correctly applying article 16f/24 and exemptions to the EU Public Procurement Directives 18/17 and without involving State Aid, will save public procurers in many countries a great deal of difficulty in starting a PCP procedure and, at the same time, should reduce a lot of discretionary interpretations threatening the competition.

Some analytical comments on the text of the draft R&D&I-Framework are formulated below.

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<td>2.3 Public procurement of research services</td>
<td>Need to consider also the “development” services (e.g. finalized to develop a limited volume of first product/services) 2.3 Public procurement of research and development services</td>
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<tr>
<td>3.1 Public purchasers may procure research services from undertakings, through both commercial procurement and pre-commercial procurement procedures</td>
<td>The commercial procurement is not intended for R&amp;D services. The relevant distinction is:  • exclusive R&amp;D services procurement (procurement of R&amp;D services which are performed exclusively for the benefit of contracting authority and wholly</td>
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remunerated)

- not exclusive R&D services procurement or "pre-commercial public procurement" (procurement of R&D services whose risk and benefits are shared with the service provider and excluded from the – entirely-scope of application of the EU Procurement Directives

3.2. As long as an open tender procedure for the public procurement is carried out in accordance with the applicable directives, the Commission will generally consider that no state aid within the meaning of Article 107(1) of the Treaty is granted to the undertakings delivering the relevant research service.

3.2. See the comment above “relevant research and development services”

3.3. 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:

As the open tender procedures is mandatory also with reference to pre-commercial procurement, it could be useful to be more explicit:

“In the absence of an open tender procedure as defined in the applicable EU Procurement Directives, in particular in the case of pre-commercial procurement, the Commission will consider that no state aid is granted to undertakings where the market price is paid …

(1) 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,

(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,

(b) the envisaged contractual arrangements describing all rights and obligations of the parties, including the IPR rights, are made available to all interested bidders in advance of the bidding procedure.

(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

c) the pre-commercial procurement does not give the provider any preferential treatment in the supply of commercial volumes of the final products or services 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"

d) one of the following conditions is fulfilled:

- 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

(d) according to equal treatment, proportionality and transparency obligation, it would be useful an explicitly mention of (beforehand) IPRs related arrangement definition:

As R&D can cover the development of a limited volume of first product or services in the form of test series, PCP may include limited supply “in order to incorporate the results of field testing and to demonstrate that the product is suitable for production or supply in quantity to acceptable quality standard” but does not include commercial development activities, it could be useful to clarify the separation between R&D phase and deployment of commercial volumes of end-products.

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

(e) the pre-commercial procurement does not give the provider any preferential treatment in the supply of commercial volumes of the final products or services to a public purchaser in the Member State concerned, and…

As the public purchaser does not require exclusive ownership of R&D benefit, such as the IPRs, in order to ensure access to a sufficiently large and competitive supply chain, he has to take the right to require the participating companies to licence out the developed solutions to third
access to third parties, for example by way of non-exclusive licenses, under market conditions.

party suppliers.

Under some circumstances decided and published upfront (e.g. not use or abuse of the IPRs ownership rights against the public interest by the PCP awardees or emerging competitive supplier base restriction), the R&D service providers to which IPRs are allocated could be obliged by the contracting authority to grant access to third parties, for example by way of non-exclusive licenses, under market conditions. These provisions shouldn’t have the (unwanted) effect to reduce the incentive to participate.

(d)…. 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 could be obliged to grant access to third parties, for example by way of non-exclusive licenses, under market conditions.

At the same time, DG Competition is asked to take an explicit stand regarding the implementation of the innovation partnership with a view to preventing actions liable to distort dynamic incentives in the market and discriminate against the participation of SMEs.

The Innovation Partnership, that combines procurement of R&D services and the subsequent supply of commercial volume of end-products, selects the preferred vendor before the market is starting R&D with no evidence of who will be able to develop the best solution, but based on “back-looking” qualification criteria such as financial capacity (e.g. minimum turnover) and technical capacity (e.g. prior customer references).

The innovation partnership procedure could, if improperly implemented, introduce anti-competitive impact on the market, stimulating a lock-in to a single supplier with no time and volume limits, favouring large-scale firms against SMEs, closing off the (local) procurement market and foreclosing competition at a point where there is no proof that the preferred supplier will be able to develop a better solution than other vendors on the market.

This potential anti-competitive impact may arise from the following issue:

- In the innovation partnership procedure, offers are not compared based on which can deliver the best solution (as there is no evidence yet of what results will emerge from R&D) but based on selection criteria and negotiation.
- Any selection criteria that require compliance with specific national requirements will have a bigger decision impact than others (concerning innovation). For example, it can be very easy for procurers to simply request that prior expertise in the field be shown in similar projects where these national requirements were also a requirement (e.g. national standards etc.). National providers will have more chance to prove compliant than others.
- Innovation partnerships will from the start already begin applying selection criteria for buying large-scale deployment. So smaller innovative companies, who may have better solutions but are unable to meet those selection criteria at the start of the R&D, will be excluded.
- Innovation partnership requires that procurers already commit to buying commercial end-products before knowing whether anybody can even deliver anything that works (R&D has yet to begin): parties will shy away from really significant and breakthrough R&D and will go for innovation partnerships for incremental adaptations and improvements to existing
solution. The ones that are best placed to deliver incremental adaptations to existing deployed solutions are the established providers, not entirely new players on the market.

Procurers in Europe award 97% of procurement contracts to national companies, with only 3% awarded to companies from another State. In the light of this evidence, innovation partnership could, in some respect, present two types of potential problems regarding competition:

- crowding out of the existing R&D investments in Europe and the risk of discouraging companies not selected for an innovation partnership procedure from applying for a public R&D grant or procurement or own investment in R&D, knowing in advance that it has already lost the market to sell to;
- reinforcement of the established providers, i.e. of major national companies, to the detriment of innovative EU SMEs and new players.

These aspects are not taken into consideration in any official Commission rules on public procurement or State Aid.

In the light of the above, it would be necessary to clarify the conditions under which innovation partnership can be used and to implement the transition between R&D procurement and a follow-up supply procurement without involving State Aid.

It could be considered that no State Aid is granted to undertakings when:

- the object of the procurement is something that is so unique that the market is represented by the first buyer and where it can be demonstrated that there are only very few suppliers in Europe that could develop and deliver this unique product,
- the 'testing' that will take place at the end of the R&D phase is open also to providers that are not taking part in the innovation partnership procedure.

This (individual) contribution to the consultation has been made in a constructive, independent spirit, in the general interest of enhancing the legal certainty, harmonising the (compliant) implementation of the new innovation procurement instruments designed to safeguard and promote the EU interest of cross-border competition within the overall R&D&I space.

Milan, 16th February 2014

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