VCI Comments
on the draft Framework for state aid for research
and development and innovation

Preliminary note
The German chemical industry association (Verband der Chemischen Industrie e. V., VCI) represents the politico-economic interests of some 1,650 German chemical companies and German subsidiaries of foreign businesses. The VCI stands for over 90 percent of the chemical industry in Germany.

The VCI is in the EU Transparency Register (Organisation-ID-Number Transparency Register: 15423437054-40).

General comments on the draft Framework:
The German chemical industry ranks among the most research-intensive sectors in Europe. In 2013 alone, the industry invested over 10 billion euros in research and development of new products.

In this context, the collaboration with public universities is greatly important for chemical companies so that the rules of the State Aid Framework for promoting research, development and innovation are highly relevant to chemical businesses.

Against this backdrop, the VCI essentially limits this position paper to comments on chapter 2.2 of the presented draft; status 19 December 2013 (Indirect state aid to undertakings through public funded research and knowledge dissemination organisations and research infrastructures).

In existing practice, it is often difficult to draw a borderline between contract research, research services and research collaborations in the meaning of the State Aid Framework. Especially research organisations increasingly tend to define all joint projects as contract research. Moreover, it is being observed that university administrations sometimes include high flat rate overheads - up to 230 percent of the direct project costs – in their full-cost calculation. This can result in unprofitably high costs for businesses.

The VCI expressly supports the goal of the State Aid Framework not to grant any indirect state aid to companies. However, when applying the State Aid Framework in practice, its provisions might lead to fewer joint research projects between industry and science – simply because of the blurred borderlines between the various forms of cooperation.
In the overall picture, the presented draft tries to bring about clarity in some respects and removes to some degree the uncertainty of the previous text. This is much appreciated, but the addressed problematic fields remain largely unsolved.

It is also worth noting that a more uniform interpretation of the State Aid Framework by the Member States should be striven for. Currently, different yardsticks seem to be applied, particularly regarding the question of what should be seen as “contract research” or “research collaboration”, respectively.

**Detailed comments on some relevant provisions:**

**Chapter 2.2 point 25**

The inclusion of “research infrastructure” as a potential partner in R&D collaboration is a new element. Irrespective of the definition in point 15 et seq., we cannot see which types of organisations/units, which were not covered by the actual framework, the Commission might be thinking of here.

**Chapter 2.2 point 25 (b) 1st indent**

It is welcomed that the present draft only speaks of “the full costs of the service plus a margin …”, i.e. the deletion of the word “reasonable” is appreciated, because this has caused legal uncertainty in the application of the existing State Aid Framework.

**Chapter 2.2 point 26**

We welcome the inclusion of the provision “Where the ownership of, or access rights to intellectual property rights (‘IPR’) are transferred to the research organisation or research infrastructure, their market value may be deducted from the price payable for the services concerned”. However, the wording “transferred” leaves unclear whether this provision covers

- only and exclusively such cases where the IP was initially allocated to the industrial partner and then transferred (back) to the research organisation or the research infrastructure, or
- also such cases where the IP is allocated right from the start to the research organisation or the research infrastructure.

**Chapter 2.2 point 27 and footnote 30**

According to point 27, the essential contractual terms and conditions of a collaboration project must be concluded between the parties prior to the project start (some examples of such terms and conditions are given). Footnote 30 clarifies that “This does not include definite agreements on the market value of resulting IPR and the value of contributions to the project” so that, consequently, such arrangements can be made (but do not need to be made) only at a later stage. This also applies to the valuation of the individual contributions by the respective project partners.
We assume that with this footnote the Commission is attempting to take into account the problem that – at the time when concluding the contract – it is not possible to make a market price payment for IP which is going to be developed by the R&D organisation and transferred to the company: obviously, because no such IP exists at that moment in time and no market value can be quoted. Here, we see uncertainty for companies, because – in the event of a transfer to the industrial company – the R&D organisations will urge for a compensation equivalent to the market price: namely, as soon as the market price has formed. In other cases, many R&D organisations will consider any IP payment under the collaboration contract merely as an initial payment, linked with a claim to further payments from the company at a later time (when the market price can be determined). Claims for further payments – especially where they are based on a commercial success by the company – invariably mean more bureaucracy for businesses and render their price calculation more difficult. Thus, in the event of an IP transfer to the company, footnote 30 brings advantages solely for the R&D organisation. For this reason, we would suggest to once more examine this provision as to a well-balanced approach.

Chapter 2.2 point 29

The VCI appreciates that the Commission is aware of the problem of determining the market price for IP. It is true that this draft, too, focuses on the research organisation concerned “to enjoy the full economic benefit”. But it is welcomed that, at least, the draft lists four options for regulatory approaches that could reach this aim.

Most calculation efforts are likely to resort to option (c).

A new approach is the “right of first refusal” as introduced in option (d). However, this option might make a suitable possibility only in a small number of rare constellations and could turn the acquisition of rights to the results into a lengthy, uncertain and often also costly process for the industrial partners.