

EARTO Answer to EC Consultation on the RDI Framework

14th February 2014

Following the EC consultation on the Commission Paper of the services of DG Competition containing a draft framework for state aid for research and development and innovation, we would like to acknowledge that the European Commission has made positive changes to the draft Framework concerning the most critical issues for RTOs.

Accordingly, the EARTO Working Group Legal Experts reviewed this draft framework and would like to point out the following key issues:

1. Public Procurement of Research Services, Article 2.3, clause 33d

In the current article 2.3 clause 33d, the bullet 2 states that *"the service provider to which results giving rise to IPR are allocated is obliged to...grant access to third parties, for example by way of non-exclusive licences, under market conditions"*.

It is clear that a sound policy for public procurement of research services in Europe would increase RDI activities in both industry and public research as such services would be paid out of the procurement budget of Members States and not necessarily put a burden on the RDI budget of Members States (which are today under very much pressure).

We consider this article 2.3 to be very similar to contract research on behalf of (private) undertakings as described in article 2.2.1. There, no state aid is passed on to such undertaking if an adequate remuneration (market price) is paid to the research organization or infrastructure. If ownership of IP is transferred to (or remains with) the research organization, the market value of that IP may be deducted from the price paid for the research services. With regard to ownership of IP arising out of public procured R&D, EARTO would welcome the same degree of freedom. In this respect, article 2.3 should be amended in such a way that the research service provider (and more generally its partners involved in the procurement) should own the IP it created without being obliged to give access to third parties. The latter would lower its motivation to participate in a call of tender for public procurement and will add to the average costs of the procured R&D. The rule should be that the "IP ownership remains with the employer of the inventor" without being obliged to give access to third parties.

Additionally, this would allow RTOs participating in such a procurement (as for example a subcontractor of the industrial company providing the service):

- to keep ownership of the IP it created and,
- to possibly grant an exclusive sectorial license to the industrial company and,
- to develop the IP in other sectors, creating the possibility in turn to complete their public mission by licensing exclusively the IP again to other industrial companies in their specific field allow further use of such IP increasing the value of the IP created under such public procurement.

This interest of allowing RTOs to be multipliers of the RDI investments made through public procurement is very well understood by Members States: at least five countries in Europe have options for this kind of procurement where the service provider owns the IP without being obliged to give access to third parties (UK, Sweden, Belgium, Switzerland, France)¹.

In this context, **EARTO proposes to add a third bullet point in 33d** in order to avoid that the service provider should be obliged additionally to grant access to third parties, which would be counterproductive to RTOs function and public mission.

¹ Source: "Compilation of results of the EC survey on the status of the implementation of pre-commercial procurement across Europe", Lieve Bos, April 2011.

EARTO offers the following text for such third bullet in 33d article:

"the service provider to which results giving rise to IPR are allocated is obliged to grant the public purchaser access to those results free of charge limited to the own internal needs of the purchaser as set out e.g. in the invitation to tender. A financial compensation linked and proportional to the effective exploitation of the IPR could be paid by the service provider to the purchaser".

2. Understanding RTOs: cooperating with industry while supported by governments

Here there are few article son which EARTO wishes to make comments at it seems clarifications are necessary to make sure that RTOs role and functioning between working for industry while receiving public support is well understood.

Article 2.1.1, point 20:

Article 2.1.1, point 20 stipulates "For the purposes of this framework, the Commission will consider that economic activities are limited in scope where resources allocated each year to such activities *do not exceed 15% of the entity's overall annual budget*". This threshold of 15 % for determining that it concerns secondary economic activities ("a purely ancillary economic activity") is rather low. Moreover the main focus of research organisations or research infrastructure is to conduct research (see definitions "research organisation" and "research infrastructure"). However in order for research organisations and research infrastructures to achieve their primary mission of research and development activities, the research organisations and research infrastructures carry out ancillary economic activities (which is not prohibited under applicable law and for which no such presumption (lower than 15% of the overall annual budget) is provided under applicable law).

EARTO would like to offer the following text change:

"...For the purposes of this framework, the Commission will consider that economic activities are limited in scope where resources allocated each year to such activities do not exceed 25% of the entity's overall annual budget"

Furthermore, the text is unclear where a research infrastructure is operated by a research organisation. Both are defined as an "entity" and therefore the text here fails to discriminate between the annual budget of the research infrastructure and annual budget of a research organisation operating it. Here, a possible double threshold should be avoided. This would also bring the article more in line with what is provided under "whereas" clause 49 of the draft GBER in respect of research infrastructures.

EARTO would like to offer the following text addition:

"...such activities do not exceed 25% of the entity's overall annual budget. In case where a research infrastructure is operated by a research organisation, for the purposes of this article only the annual budget of the research infrastructure is taken into consideration"

Article 2.2.2, point 27, 28 and 29:

Article 2.2.2 provides rules for when research organisations/research infrastructures are collaborating with undertakings ("cooperation with industry"). Article 2.2.2 point 28 provides in particular the possibility of industry to reduce the license fee for the use of results of RTOs, even in cases where such undertaking made only a non-financial contribution to the collaborative project. Further allocation of the IPR of the collaborative project should imply that the RTOs enjoy the full benefit (including economic benefit of such IPR) by using them in RTOs' sole discretion. This economic benefit implies not only the right to own such IPRs but includes the right to exercise such ownership rights by example transferring ownership or licensing the IPR at financial conditions to be agreed upon.

Accordingly, EARTO would like to see the point (d) deleted out of the sentence:

"The absolute amount of the value of any contribution, both financial and non-financial, of the participating undertakings to the costs of the research organizations or research infrastructures' activities that resulted in the specific IPR concerned, may be deducted from that compensation."



3. Missing definitions

In addition, EARTO would like to mention that the definitions provided in this document and in the draft Commission Regulation declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty should be harmonised. IN particular, the definitions of “aid intensity”, “industrial research”, “research and knowledge dissemination organisation”. Here we would like to refer to EARTO answer to the parallel EC consultation on the GBER.

EARTO is a non-profit international association established in Brussels, where it maintains a permanent secretariat. The Association represents the interests of about 350 RTOs from across the European Union and “FP-associated” countries.

EARTO Vision: a European research and innovation system without borders in which RTOs occupy nodal positions and possess the necessary resources and independence to make a major contribution to a competitive European economy and high quality of life through beneficial cooperation with all stakeholders.

EARTO Mission: to promote and defend the interests of RTOs in Europe by reinforcing their profile and position as a key player in the minds of EU decision-makers and by seeking to ensure that European R&D and innovation programmes are best attuned to their interests; to provide added-value services to EARTO members to help them to improve their operational practices and business performance as well as to provide them with information and advice to help them make the best use of European R&D and innovation programme funding opportunities.

EARTO Working Group Legal Experts: is composed of 25 corporate legal advisers working within our membership. Established autumn 2013, this Working Group has also produced an answer to the EC Consultation on the GBER. Our experts are also involved in the definition of eth new DESCA Consortium Agreement model for Horizon2020.

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