

EARTO Paper on How to Boost Pre-Commercial Procurement in Horizon 2020

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In view of the upcoming mid-term review of Horizon 2020, EARTO members would like to offer suggestions for adapting pre-commercial procurement rules in Horizon2020 in order to boost the use of such instruments.

Today, the Horizon 2020 (H2020) Work Programme 2016-2017 General Annexes (page 22) states¹:

*"In Pre-Commercial Procurement, procurers do not reserve the R&D results exclusively for their own use. An R&D provider generating results in PCP must own the attached IPRs. **The procurers must enjoy royalty-free access rights to use the R&D results for their own use. The procurers must also enjoy the right to grant or to require participating R&D providers to grant non-exclusive licenses to third parties to exploit the results under fair and reasonable market conditions without any right to sublicense.**"*

EARTO members believe these conditions go against a sound intellectual property (IP) policy for pre-commercial procurement (PCP) in H2020 and undermines the number and quality of answers to PCP calls for tender.

Accordingly, EARTO members would like to propose that this paragraph is amended in such a way that the R&D providers should own the IP of the R&D results and have no obligation to give access to third parties, as this lowers their motivation to participate in a H2020 PCP call and represent a cost for the procured R&D.

EARTO members would welcome a rule which implies that IP ownership remains with the employer of the inventor². This would also be necessary when one of the R&D providers is an SME, as SMEs need sectorial exclusivity in order to develop and to compete. Additionally, if the SME is a start-up, the proposed modification would be even more important, as venture capitalists tend to invest more in start-ups which own the intellectual property and are not obliged to give access to third parties, or have a sectorial exclusive license from a public research organisation or any other R&D provider³.

The proposed change would allow RTOs participating in PCP, for example as R&D provider or a subcontractor of a R&D provider, to:

- Keep ownership of the foreground IP it created, e.g. when the foreground IP created in the PCP is new or an improvement of a RTO's background IP.
- Possibly grant an exclusive sectorial license on such IP to the industrial company being the R&D provider.
- 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 other specific fields and allow further use of such IP increasing its value under such public procurement.

If foreground IP created in the PCP is an improvement of a SME's background IP, foreground IP could possibly, on a case by case basis, be assigned to the SME, and the SME could grant an exclusive license to the RTO in other fields than in its own fields.

The value of allowing RTOs to be multipliers of the RDI investments made through public procurement is well understood by some Members States. Indeed, at least five countries in Europe have options for this type of procurement where the R&D provider owns the IP without obligation to give access to third parties: UK, Sweden, Belgium, Switzerland, France⁴.

¹ [H2020 General Annexes](#)

² [EARTO Answer to EC Consultation on Revision on RDI State Aid Framework](#)

³ [Science, Research and Innovation Performance in the EU 2016 - 14 March 2016, p. 263](#)

⁴ [Compilation of results of the EC survey on the status of the implementation of pre-commercial procurement across Europe](#), Lieve Bos, April 2011

In this context, EARTO proposes to the European Commission to:

1. Remove the sentence from the Work Programme 2016-2017 General Annexes: **"The procurers shall also enjoy the right to grant or to require participating R&D providers to grant non-exclusive licenses to third parties to exploit the results under fair and reasonable market conditions without any right to sublicense"** as we believe this is counterproductive to RTOs' functioning and public mission and it lowers the motivation of industrial companies, especially SMEs and start-ups, to participate in PCPs as R&D provider.
2. In line with the above, we would also like to propose the removal in Horizon 2020's General Model Grant Agreement, Multi V2.1, page 34⁵, of the sentence: **"the right of the buyers to grant (or to require the subcontractors to grant) non-exclusive licences to third parties to exploit the results – under fair and reasonable conditions – (without the right to sub-licence)"**.

EARTO and its members hope that the above mentioned comments can be taken into consideration by the European Commission and remain ready for discussion and for providing additional information on such issues.

EARTO - European Association of Research and Technology Organisations is a non-profit international association established in Brussels, where it maintains a permanent Secretariat. The Association represents the interests of about 350 Research and Technology Organisations (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 in autumn 2013, this Working Group has also worked on the revision of the State-Aid Rules & the GBER. Our experts also contributed to the setting-up of the DESCA Consortium Agreement model for Horizon 2020.

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⁵ [Horizon 2020 Model Grant Agreement – Multi V2.1](#)
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