PHILIPS

Philips position on the Commission's proposals for Horizon 2020

1. Introduction and overall impression

The first Framework Programme began in 1984, when the Commission launched ESPRIT, in close cooperation with twelve large European ICT firms including Philips. Since then, Philips has actively and fruitfully participated in over 1,000 R&D projects under successive Framework Programmes. Therefore, we would like to actively contribute to the debate on the next Framework Programme (FP) by putting forward our comments on the Commission's proposals for Horizon 2020 as published on November 30, 2011.

Overall, the package of proposals for Horizon 2020 looks quite promising, provided of course that the programme will be properly implemented. In short, the main positive points are that Horizon 2020

- requests a 46% budget increase to 80 B€ for 2014-2020 (albeit the minimum required to continue the 2013 level of activities);
- addresses enabling technologies as well as their applications in Societal Challenges, with the latter providing interesting business opportunities;
- integrates the continuation of current FP, CIP and EIT activities;
- retains collaborative R&D projects as main activity;
- provides more room for development, demonstration, pilots and market uptake;
- judges proposals not only on (scientific) excellence, but also on impact and implementation;
- promises more flexibility to adapt to developments in science, technology and markets;
- stimulates research and innovation also from the demand side via public procurement;
- expands Marie Curie public-private staff exchanges with industrial doctorates;
- simplifies procedures and streamlines instruments;
- balances trust and control;
- allows for lean and mean contractual Public-Private Partnerships (PPPs) in addition to Joint Technology Initiatives;
- applies a uniform funding rate.

Our main concerns are some serious IP-related issues in the Rules for Participation (RfP, see section 7). In addition, we have some other points of attention, as outlined in sections 2-6.

2. General comments

Business participation

Whereas large and small companies together perform well over 60% of all R&D in Europe, private sector participation in successive Framework Programmes has been declining steadily for fifteen years. In terms of funding, industry participation passed from 43% in FP4 to 37% in FP5, to 29% in FP6

and 31% so far in FP7. As the scope of Horizon 2020 as the next FP explicitly includes innovation, reversing this trend and attracting more industry to the EU funded R&D&I projects must be a priority; this could be more easily achieved by checking the actual rate of industry participation against an indicative figure. We consider 35% of total funding in Horizon 2020 as a yardstick for adequate focus on innovation and involvement of the business sector, and request the Commission to regularly publish data on progress.

Charter & Code

Philips supports the basic principles of the Charter for Researchers and the Code of Conduct for their Recruitment. Nevertheless, we have some serious concerns regarding their implementation. Whereas to a large extent Charter and Code are already being applied in industrial research labs, a full implementation of every element is simply not possible. According to the definitions, Charter and Code apply not only to basic research and strategic research, but also to all professionals in applied research, experimental development, innovation and a wide range of support functions related to R&D. Whereas the Charter and Code may be suited for academic researchers and partly also to industrial researchers in Corporate labs, they are certainly not workable for developers in the business sectors of large firms and even less for innovators in SMEs. For example, in view of Europe's efforts towards "better regulation" we cannot imagine that innovating SMEs would have to publish all their vacancies for R&D staff on the European Researcher's Mobility portal and that they should use selection committees with the composition prescribed by the Code. Furthermore, checking compliance would cause major red tape, and hence substantial administrative efforts and costs. Therefore, the Charter and Code should not be made mandatory, at least not for industry. Also, adherence should not be made a prerequisite for participation and funding in Horizon 2020. Therefore, in line with recital 22 of the proposed Framework Regulation, article 16.4 of the RfP and section 3.6 of the Specific Programme (SP) should specifically emphasize their voluntary character.

Flexibility

We very much welcome the flexibility promised in recital 21 and article14 of the Framework Regulation to adapt priorities and actions to changing needs and take account of the evolving nature of science, technology, innovation, markets and society. Unfortunately, the RfP fail to provide concrete ways to also give ongoing projects the flexibility needed to adapt to market developments and retain their industrial relevance. In this respect, the change request procedure familiar from Eureka projects (e.g. in the ICT clusters) would be a good example.

Public-Private Partnerships (PPPs)

- We welcome the ample attention given to contractual PPPs as possible "lighter" alternatives for Joint Technology Initiatives (JTIs) implemented as Joint Undertakings. For more details see our recommendations on future

JTIs and PPPs in our reply[1] to question 15.2 of the 2011 consultation on the Common Strategic Framework.

- Replacing grants with reimbursable loans or fiscal incentives (e.g. as currently being considered in the Netherlands) may cause additional complications in the ARTEMIS and ENIAC JTIs, to the detriment of Dutch participants and their partners in other Member States

Public-Public Partnerships (P2Ps)

- The proposed public-public partnerships (e.g. Joint Programming, ERA-NET, Aarticle 185, programme co-fund grants) will probably face the three fundamental problems outlined in our reply[1] to question 4 of the CSF consultation:
  i. synchronising national project funding between countries;
  ii. balancing oversubscription levels between countries;
  iii. balancing national and common interests in the joint selection of proposals.
- Replacing grants with reimbursable loans or fiscal incentives (e.g. as currently being considered in the Netherlands) may cause additional complications.
- Obviously, there is a need for a smarter ERA instrument for pooling Member States' resources, with or without EU co-funding.

Large-scale public-sector pilots and demonstrations

The activities of Horizon 2020 will cover the full cycle from research to market, with a new focus on innovation related activities, including large-scale piloting, demonstration, test-beds, and living labs. However, to our experience, the present CIP ICT Policy Support Programme (PSP) designed for pre-competitive market demonstration and validation of limited size is not suited for the implementation of large-scale actions in the public sector, mainly for two reasons:

- The execution of such large-scale demonstration and validation projects under 'real-life' conditions are hampered as the CIP ICT PCP instruments and rules appear to be in conflict with the public procurement rules and regulations as set forth in the EU Procurement Directives applicable to public authorities for selecting suppliers in such large-scale pilots within CIP. In Horizon 2020 such large-scale trials might therefore require tendering in line with the Procurement Directives. This issue needs to be clarified.
- The non-profit requirement in the CIP rules make business participation in large-scale demonstration and market validation actions unattractive and unrealistic, as those rules do not reflect commercial conditions.

Furthermore, whereas collaborating is often crucial in the phases of pre-commercial R&D and innovation, this might not always be possible or desirable in the commercial phase. Therefore, we have doubts whether large trials and similarly commercial procurement activities would fit well in the non-

[1] http://ec.europa.eu/research/horizon2020/pdf/contributions/post/netherlands/philips.pdf#view=fit&pagemode=none

profit setting that will probably also prevail in Horizon 2020. Again, the Structural Funds might be more suited for this purpose.

Information, communication and dissemination

Any actions proposed in Article 22 of the Framework Regulation to bring together results from a range of projects, including those that may be funded from other sources, should respect pre-existing IPR provisions for those projects.

State aid rules

The statement in recital 31 of the Framework Regulation and recital 14 of the RfP that funding provided by Horizon 2020 should be designed in accordance with State aid rules will lead to legal uncertainty, not only because the State aid rules have been specifically designed for Member States and their application to EU actions will lead to unclarities, but also because the State aid rules contain several ambiguities (see e.g. chapter 7 of the Responsible Partnering Handbook[2]). Specifically this would mean that articles 22-24 and all provisions in the RfP on access rights to and transfer of results may become meaningless, since State aid rules may imply that funding rates will be (substantially) lower than the percentages mentioned or that certain costs are not eligible because of State aid rules and that certain IP arrangements that would fit in the RfP would not be allowed because of State aid rules. Instead of referring to the State aid rules, it would be better if the Horizon 2020 proposals were to clearly indicate which boundary conditions will apply.

International cooperation

We welcome that reciprocal access to third country programmes will be encouraged. This should also apply for the local R&D labs in third countries of European multinational companies.

3. Specific comments on Excellent Science

Marie Skłodowska-Curie actions

- The inclusion of Marie Curie Actions in the Excellent Science part should by no means limit the scope of the R&D activities to fundamental research or hamper the involvement of industry.
- We very much welcome the industrial doctorates as an important new element in the range of activities to foster cross-sector mobility.
- We hope that the proposed cross-sectoral activities will also allow for a continuation of the ITN and IAPP activities of FP7, ideally in an approach similar to the Industry Host Fellowships of FP5.
- A reference to outgoing international fellows is missing in the text.

[2] http://www.eirma.org/doc/pubs/briefs/rp-2009-v11.pdf

- We are pleased to notice that also short-term staff exchanges between public and private R&D actors and between countries (also outside EU) will be possible.
- Whereas in the past most emphasis was placed on Marie Curie as an instrument for skill and career development, more attention will be needed for life-long training and vocational education in order to keep and grow jobs in the EU.

Research Infrastructures

- In addition of its possible involvement in research infrastructures as a supplier of scientific equipment or a user of public infrastructures, industry should have the possibility to be involved as a provider of private research facilities (e.g. the MiPlaza facilities of Philips Innovation Services at the High Tech Campus Eindhoven).

4. Specific comments on Industrial Leadership

- How will the ICT-specific research infrastructures in Part II (Industrial Leadership) relate to the general research infrastructures in Part I (Excellent Science)?
- In the future, the pervasive and pivotal role of ICT will only increase further, for example in urban areas, in food security and sustainable agriculture by creating optimum growth conditions in green houses and co-called city farms.
- In the case of large companies, the new debt facility should go beyond the current rather modest risk taking in RSFF/FP7 by investing only at the company level; instead the new debt instrument should engage in real risk sharing by directly investing in a company's riskier R&D projects.
- We agree that stimulating growth by means of increasing innovation in SMEs can best be achieved by mainstreaming SME aspects in all parts of Horizon 2020, allowing them to benefit from the interaction with other public and private actors in the innovation ecosystem. However, it is not clear how the new SME instrument will work in practice and whether it will come as a complement or a substitute of current SME participation in collaborative R&D projects. In the latter case, SMEs might become disconnected from other actors in research and innovation.
- Eurostars should continue to allow the involvement of other R&D actors than research intensive SMEs, such as large companies.
- Apparently, the FP7 activities on "Support to SMEs" will not be continued. If they nevertheless were to be continued in Horizon 2020, outsourcing should be allowed not only to public research organisations, but also to research intensive SMEs or large companies.

5. Specific comments on Societal Challenges

- In the listed activities under the challenge "Health, Demographic Change and Wellbeing", multiple references are made to the notion of "better understanding". This suggests a too academic approach; for actually

tackling this societal challenge it will be necessary to also pay attention to the implementation and application of the research results.

- For addressing the societal challenges, multidisciplinary collaboration should drastically be increased. This definitely also holds for energy efficiency in the built environment, where the lack of a common approach between the construction sector, equipment suppliers (lighting, HVAC, building controls and renewables), public authorities and the users has hampered the progress in realizing the energy efficiency required in order to reach the EU 2020 energy targets.
- How do the activities of the JRC on the societal challenges in Part IV contribute to the activities on the Societal Challenges in Part III?

6. EIT

- The proposed way of operating the EIT KICs "according to business logic", "driven by a CEO", "represented by single legal entities" as "highly integrated, new legal ventures" allowing "partners to unite" is not in line with how we would like to see the KICs operate, as outlined in our replies[3] to questions 14 and 22 of the 2011 consultation on the EIT.
- In our view, it is unrealistic to envision a KIC as a "highly integrated venture":
    - the current KICs are not such ventures;
    - KICs should focus much more on their facilitating role to set up and maintain an innovation network of independent partners and support that network and their activities in connecting the knowledge triangle in accordance with a long term strategic plan (not a business plan, since the KIC is not running a business or more businesses; that is what the partners do.)
- We doubt whether the EIT Foundation will manage to raise substantial funds from private industry.

7. Specific comments on the Rules for Participation and Dissemination

- We fear that some of the IP provisions may seriously hamper the exploitation of the results from EU-funded actions and the participation of the business sector, in particular of global companies. For detailed comments on the IP provisions in the RfP we refer to the attached position paper of DIGITALEUROPE, to which we have made major contributions.
- Recital 19 refers to the possibility of additional exploitation conditions in the European strategic interest. This should not lead to a protectionist approach comparable to the "Europe First" IP policy advocated in the recent report of the High Level Group on Key Enabling Technologies (KET). See the letter[4] from BUSINESSEUROPE and the position[5] of DIGITALEUROPE.

[3] http://ec.europa.eu/education/eit/docs/Written_responses/companies/7_Philips/EIT%20OPC%20Philips%20response.pdf
[4] http://www.businesseurope.eu/content/default.asp?PageID=568&DocID=29166
[5] Page 22 of http://ec.europa.eu/research/era/pdf/contributions/digitaleurope-response_en.pdf

- Any Open Access obligations should only apply to publications, not for all results, because that could destroy rather than create value. See the position[6] of BUSINESSEUROPE on Open Access.

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[6] http://www.businesseurope.eu/content/default.asp?PageID=568&DocID=28127

DIGITALEUROPE

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DIGITALEUROPE Position on draft Rules of Participation for Horizon2020

DIGITALEUROPE has examined the Proposal for a REGULATION (EU) OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL laying down the rules for the participation and dissemination in Horizon 2020 – the Framework Programme for Research and Innovation (2014-2020), hereinafter referred to as the "Rules" and has the following comments.

Main principles used by DIGITALEUROPE

As starting point for this examination DIGITALEUROPE has formulated some main principles against which it has assessed the current proposed Rules. These principles have been based on the main objective of the previous framework programmes and Horizon 2020: *giving European economic and industrial competitiveness a boost, by supporting a.o. collaborative projects that bring together partners from industry and academia with the aim to place innovations that support Europe's economy into the market, as outlined in the different documents regarding Horizon 2020, amongst others in the Proposal for a Regulation of the European Parliament and of the Council on Horizon 2020 – the framework programme for research and innovation :*

1. To ensure that such projects contribute to the aforementioned objective, the Rules should support the following principles:

- an efficient exploitation of project results for the sake of the European economy, avoiding barriers which may have a negative impact on exploitation, while taking into account justified interests of parties involved in the collaboration

- that each partner in such project should spend, in principle, the efforts necessary to perform its tasks and contribute all its relevant information, expertise and intellectual property that are needed to perform the project and/or to exploit the results of the project, all to the extent such information and intellectual property have not been excluded explicitly by such partner.

2. Since collaborative projects lead to efficiency gains mainly because the work load and risk can be divided over the different parties in the project, as well as consensus building between project partners can be supported. Collaboration implies that results of each of the parties may be dependent on results of other parties. To avoid that results cannot be exploited, access to other parties' results for the use of one's own results is an essential cornerstone of each collaboration, providing for the licensing parties' the right to be compensated for use of

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their intellectual property. In certain cases, depending on all relevant circumstances, non-royalty-free fair and reasonable conditions for access to results may be justified. In other cases, depending on all relevant circumstances, appropriate terms may consist of royalty-free conditions.

3. Exploitation of results of projects by companies, even by SMEs, often takes place through other legal entities belonging to the same group of companies than the entities that have carried out the research. Efficient exploitation therefore means that companies must have the possibility to use the results within the group of companies to which they belong. In the global economy of which Europe forms part, effective exploitation of results means that results should be accessible for exploitation, whether by transfer or licensing arrangements, for all entities belonging to a group, on a worldwide basis.

4. Appropriate protection of intellectual property resulting from the projects is key for an efficient exploitation of the results achieved and is justified to protect investments made by the funding authority and parties to the project. Such protection can take place by various means like intellectual property rights or by keeping certain information confidential. Parties should be free to determine which way of protection fits their exploitation purpose and the Rules should not include provisions that frustrate this protection.

Most of the principles set out above have an impact on the part of the Rules that concern intellectual property and rights in respect thereof.

General Assessment of the Rules

Already during the preparation phase of the previous Framework Programme ("FP7"), the ICT industry, through EICTA (today known as DIGITALEUROPE), has expressed its concerns regarding the Rules, as there was a deterioration of the IPR provisions compared to FP6.[1]

During a consultation with stakeholders, Commission representatives have declared that it was the Commission's intention not to make substantial changes to the Rules of Participation for FP7. DIGITALEUROPE therefore is quite disappointed that after having analysed the proposed Rules for Horizon 2020, it has to be concluded that the proposed Rules make substantial changes and lead to a further deterioration of the IPR provisions that should support the principles set out above.

[1] See the letter of March 27, 2006 of EICTA, today known as DIGITALEUROPE, to Ms. Megan Richards, European Commission, DG RTD, Head of the Regulatory and cross-cutting matters Unit

We will set out below in more detail how we have come to this conclusion.

Detailed Assessment of the Rules

1. Article 2 – Definitions - Definition of Background

The proposed definition of "background" substantially deviates from the usual definitions in FP7 and previous FPs. It no longer includes the basic principle that background is "all intellectual property" that is "needed" for the performance of the project or exploitation of results, and therefore should be made available in order not to block performance of the project or the use of the results. The deletion of this basic principle may lead to the situation that projects cannot be performed or results cannot be exploited, since relevant background is not made available for access.

Sideground, being intellectual property that is generated outside the project and after the start of the project, should in principle be available for access if it is brought into the project by the owner of such sideground and if it is needed for carrying out the project or use of the foreground to avoid that such sideground will be a blocking factor for performance of the project or use of project results.

DIGITALEUROPE appreciates that in accordance with article 42 of the proposed Rules, the background may be identified in any manner in a written agreement.

2. Article 2 – Definitions - No Definition of exploitation

A definition of exploitation is missing. This however is an essential term that needs definition to avoid legal uncertainty about the scope of the access rights. In the proposed Rules, "exploitation" implies commercial use, but this is too restrictive, as further research and development and indirect utilisation, meaning so-called "have made rights", should also be included as was the case in the term "use" under FP7.

3. Article 38.2 - Ownership of results – default regime

a. With regard to joint ownership, the draft Rules, in particular the default regime with prior notification and compensation for non-exclusive licensing to third parties are creating substantial barriers for the exploitation of the jointly owned intellectual property.

b. As a general principle partners and their affiliates should be able to use jointly owned intellectual property in the same unrestricted manner as they can use solely owned foreground. Since joint ownership of results implies that it is not possible to separate the work leading to the invention or invention itself into "separate" IPRs, if a default regime includes barriers for exploitation, parties will avoid as much as possible real cooperation to avoid such joint ownership, at the expense of the efficiency gains of cooperation. It even may have the effect that the participation of industry in FP-funded collaborative projects will decrease further, which has been decreasing over the years, partly because of problems with the intellectual property arrangements like this one. This all will be detrimental for these types of collaboration projects and does not support the objectives of Horizon 2020.

c. Each joint owner should in principle have the full right to all benefits resulting from its own work, including the exploitation potential, without permission of others. The fact that the benefits of joint IP for industry is partially different from the benefits for academic partners (generally it will lead to monetary benefits from exploitation for industrial partners whereas academia will enjoy better education, more income from licensing and start up activities etc), should not change this principle. The default regime stipulated in the proposed Rules has the consequence that the industry partners should share their benefits, generally proceeds of exploitation, with the academic partners, whereas academic partners could not share their benefits, such as better education, income from start-up activities, ability to increase contract funding from third parties, higher ranking in quality assessment of the academic partners, with the industrial partners.

d. For most of the bigger companies in the ICT domain it is not possible to give prior notice in case joint IP is licensed to a third party through a (broad scope) cross-license that is already in place. Common practice in this field is that all new IP generated by the parties to the cross-license, whether it is solely or jointly owned IP, is absorbed by the cross-licenses. For competitive and confidentiality reasons it is generally not possible to disclose the list of companies with which cross-licenses are in place. The same concerns apply in the case of M&A transactions.

e. Obliging companies to compensate joint owners for the fact that jointly owned IP might be automatically included in broad scope cross license agreements (where such jointly owned IP is only one of many other licensed IP so that no specific financial benefit can be attached to it) will cause that companies will exclude jointly owned IP from cross licenses, which will not help exploitation of results of funded collaborations.

f. The default regime is proven to have a detrimental effect on the conclusion of consortium agreements. It often results in long discussions between the partners and creates a lot of mistrust between the parties. This can be avoided by not forcing parties into a default regime that in general does not work for a substantial part of the participants in these types of programmes for the reasons set out above.

Conclusion: the default regime for joint ownership should be a regime that supports exploitation and does not drive parties away from genuine collaboration. That regime should support unrestricted use by a joint owner and its affiliates of its joint IP, without giving notice to

another or paying compensation to another – like for its solely owned IP. Parties however should have the freedom to deviate from that if they explicitly so agree.

4. Article 39 - Protection of results

Article 39 para 1 gives rules on when results should be protected with the recognition that in some cases protection might not be justified in the interest of the owner of the results or other participants to the project. Para 2, however, stipulates if a party intends not to protect for reasons other than *"impossibility under the Union or national law or lack of potential for commercial exploitation" or intention of the party to transfer to another legal entity in the EU,* one must notify the EC or funding body and the EC or funding body can choose to assume ownership of the results. There is a mismatch between para 1 and para 2, in the sense that if one would not be obliged to protect results under para 1, the EC or other funding body could still assume ownership of those results, since they fall within the scope of the different criteria of para 2 for assuming ownership. To correct this mismatch, para 2 should be redrafted in such a way that only if one does not protect in violation of para 1, one may be confronted with loosing ownership as a result of para 2. Moreover, it is generally questionable whether a transfer of ownership to the EC or funding body is the adequate remedy for this kind of situation.

Article 39 section 3 disallows abandonment of protection of results in certain circumstances without allowing the Commission or funding body to take ownership. This article neglects the typical practices applied in IP portfolio management, and thereby obliges parties to maintain such protection against such practices if the party wants to avoid ownership by the Commission or funding body. Also, one of the most prominent reasons for abandoning protection is that the probability of being awarded protection with a reasonable scope is assessed by the owner as too low. DIGITALEUROPE proposes that abandonment of the protection be left at the discretion of the owner of the result, as it is anyway expectable that the owner applies commercially reasonable portfolio management practices, especially after having already earlier made the investment into the filing for protection.

5. Article 45. 3 - Access rights for exploitation: access rights to affiliated entities.

DIGITALEUROPE appreciates that there is a provision allowing for access rights to the affiliated entities, but we regret that such access is limited to affiliated companies in the EU and Associated Countries. If the Rules are not changed this would imply that industrial partners always have to provide for access rights to affiliated companies outside the EU in the consortium agreement. In this context, we refer to DIGITALEUROPE Position on "Europe First" IP Policy, dated 12th September, 2011. In that paper it is argued that if the so-called Europe First IPR Policy would be implemented in the sense of limiting exploitation of results of funded projects to Europe first, this would not be in the interest of Europe and will not

support the objectives of Horizon 2020. This limitation would actually hinder exploitation of results of Horizon 2020 projects in the case where components necessary for such exploitation are only available outside of Europe (e.g. products using semiconductors that are only manufactured outside the EU). Moreover, manufacturing these products in Europe would make them so expensive that they would not be competitive on the world market and European customers would therefore choose products from other regions for economic reasons. An artificial limitation to European affiliated entities would neglect the presence of globalisation in the production chain. DIGITALEUROPE therefore advocates a removal of the territorial limitation on eligible affiliated entities.

Text argument on Article 45.3: add “by it” after “needed” to avoid the discussion that affiliates never need access rights since the participant can exploit itself and does not need the affiliates to do so.

6. Article 41.1 - Transfer and exclusive licensing – prior notice to the other participants

The requirement that other participants receive prior notice in case of transfer of the results is not necessary and very burdensome to implement in practice. The key concern for the participants is that, in case of transfer of ownership, their access rights are safeguarded. This is already provided for in the proposed Rules of Participation, so there is no compelling reason to restrict transfers, which very well may be a form of exploitation, with such a burdensome requirement. Moreover, the requirement to notify is not possible to implement in M&A transactions. The “carve out” for M&A transactions does not have substantial practical effect since limitations to disclose intentions to transfer are not only based on statutory or regulatory restrictions but foremost based on confidentiality agreements between the parties involved which are necessary to facilitate a proper negotiation process. (See also comments under Section 7. Transfer and exclusive licensing). In addition, there can be other legitimate reasons why it is impossible for a participant to notify on a planned transaction involving transfer of IP rights, for instance where such transaction could have an impact on traded stocks. DIGITALEUROPE advocates that it should be left to the participants in the individual project to decide whether or under which circumstances they want to notify each other about envisaged transfers (as long as access rights of participants are protected). Therefore the waiver possibility in the proposed Rules of Participation should be broadened in its scope.

7. Article 41.3 - Transfer and exclusive licensing – right to object by the EU Commission

Although this rule was also included in the Rules for FP7, we have not seen that the Commission would be having a system in place to deal with a generic implementation of this rule. Moreover, as far as we are aware, this right is not (often) used by the EC. That practice of the EC is logical since in general a transfer of IP outside Europe is not necessarily against the interest of Europe. Already since tax law of the various member states require a fair

compensation for the value of that IP, the European economy will benefit from such transfer. We recognise that in limited circumstances the right to object to a transfer might be in the interest of Europe. We therefore propose that obtaining the consent from the EU Commission is not set as the rule, but as the exception for specific circumstances when the European interests are at stake. The Rules therefore should only provide a basis that grants the EC the right to object in those projects in which it is likely that EU interest might be at stake in case of a transfer outside Europe.

8. Article 40.2 - Open access

DIGITALEUROPE has no objection against open access if scientific publications are concerned. However, it is not in the interest of exploiting results of projects that all data and other results of the projects should be publicly disclosed. The current definition of "dissemination" however includes the obligation to "publicly" disclose all results of the project. This would have a serious impact on the exploitation potential of the results of the project and the willingness of parties to invest themselves in these types of projects or in the commercialisation of the results. If everything is made "open", the value of the results of publicly funded projects is deteriorated. Moreover, the requirement that all data and results of projects should be publicly disclosed seems to be at odds with the core purpose of Horizon 2020 to make Europe more competitive. Additionally, in case the results include software, requirement to make them public could potentially lead to uncontrolled or unintentional licensing of pre-existing patents not justified by merely the public funding.

The new definition of dissemination leads to a much more "open access" than apparently is intended in the open access clause (art. 40 para. 2) or in the current Open Access pilot in FP7. Therefore, the definition of dissemination should go back to the text of FP7 and previous FPs.

Article 42, para 2, itself on open access should be clarified in the sense that it is made clear by a definition of the term "open access" what open access means, and is further clarified to what it exactly applies and what other conditions the EC could impose in the grant agreement. In this respect the current Open Access pilot in FP7 is a good example.

9. Article 46 - Secure societies

Article 46 para 2 stipulates that that "*Regarding actions in the specific challenge 'Secure societies' within the 'Inclusive, innovative and secure societies challenge', the European Union Institutions and bodies as well as Member States' national authorities shall, for the purpose of developing, implementing and monitoring their policies or programmes in this area, enjoy access rights to the results of a participant having received an EU financial*

contribution. Such access rights shall include the right to authorise third parties to use the results in public procurement in the case of the development of capabilities in domains with very limited market size and a risk of market failure, and where a predominant public interest exists." We believe this rule introduces legal uncertainty, particularly with respect to involuntary grant of access rights to "third parties." If there are strong policy reasons to introduce these new rules, the Commission should re-craft it to ensure that it is well-bounded.

10. Article 49 - Procurement, pre-commercial public procurement, public procurement and public procurement of innovative solutions

DIGITALEUROPE appreciates that also in the case of pre-commercial public procurement the contractor generating results in pre-commercial public procurement shall own at least the attached intellectual property rights to the results. In other words, the principle that the "inventor owns the results" applies. However, we do not agree with the last sentence of article 49.2 stating that in case the contractor fails to commercially exploit the results within a given period, it shall transfer the ownership of the results to the contracting authorities. Contractors should not risk to lose their ownership rights for reason of lack of commercialisation, which can be due to specific market circumstances, or based on other legitimate decisions from the contractor. Moreover "triggering event" for this obligation is unclear and leads to legal uncertainty. When could it be established that there is a "failure to commercially exploit"? In addition, it should be noted that transfer of results would lead to costs (e.g. cost of patent re-registration). Why would such additional costs be accrued if there are no reasonable possibilities for commercial exploitation of the results in which case the authorities would probably not want to have the results transferred at all? Regulation should not substitute freedom of contract here, i.e. a mutually agreeable solution suitable for the project in question between the parties.

Article 49.3: the intention behind this clause is unclear and leads to legal uncertainty. What type of arrangements would authorities put into those contracts regarding the products and services procured thereunder and why is that required? These products and services are not necessarily developed with EU or other public funding, and we do not understand why an authority would have to claim rights thereto or why it should have other rights than private parties than act as (launching) customer.

11. Liability

In the Rules (Article 19.2) a statement is inserted that the financial responsibility of each participant shall be limited to its own debt, subject to the provisions relating to the Guarantee Fund.

DIGITALEUROPE is of the opinion that this statement is unclear. It needs to be specified what “own debt” means. Since participants in a project have a joint and several liability for the technical implementation of the project, “own debt” could also be extended to the debt that is incurred for reason of not performing the obligations from another participant under the joint and several technical liability. DIGITALEUROPE requests a very clear statement in the Rules that a participant can never be financially liable for funding that it has not directly received itself.

Finally DIGITALEUROPE wants to remark that the provisions related to Ownership, Exploitation and Dissemination of the Rules are appropriate for R&D activities. Since it is the intention of the Commission to apply the Rules also to actions in the so called KICs, with EIT funding, where besides research activities, also innovations and education activities are funded, the question arises whether these provisions are also appropriate for this kind of actions. For the activities outside R&D activities, there needs to be more dedicated rules.

12. Article 16 and 20 Consortium agreement and grant agreement

Article 16 describes what is being dealt with in the grant agreement. Article 20 only states that the consortium agreement is some sort of internal agreement between participants to a project but does not give directions on what can be dealt with as the FP7 Rules did. This may lead to the discussion whether the consortium agreement can deal with the topic as access rights, exploitation etc. as referred to in article 16.3 or that those are exclusively dealt with in the grant agreement. We therefore suggest that a provision is included in article 20 to the effect that participants may make all arrangements in the consortium agreement they deem fit to the extent those arrangements are not in conflict with the grant agreement.

13 – Recital 14 - State aid rules

Recital 14 states as follows: “*H2020 funding will be “designed in accordance with State aid rules*”.

It is unclear what this means for actual funding and potential IP arrangements in projects. What impact does this have on actual funding and possibilities for participants to make IP arrangements that do conform to the Rules but might in view of some (unclear) aspects of the EC State aid Framework regarding R&D&I of 2007 be deemed in conflict with these rules. See previous input of DIGITALEUROPE on this Framework.

In our view, the EU should not apply rules of the EU Treaties, Block Exemptions and other regulations (e.g. the State Aid framework 2007) that are directed only (!) to Member States to the EU itself. Those rules do not apply to the Union and are not written for application to the Union which will lead to legal uncertainty and complexity if they are applied for that purpose (e.g. certain exemptions from those rules can be given by the EC. Should the EC now exempt itself?). If the EC wishes to follow certain principles that are laid down in these state aid rules, those principles should be worked into the Rules itself, and clear specific rules should be given in the Rules (and grant agreements based thereon) in order for participants to derive from the Rules and grant agreement what the boundaries are for their funding and internal (IP) arrangements.

Moreover, as a general rule, the EU should assess whether it is not stricter in the application of state aid prohibitions than what other competing economic blocks like the US and China are doing on this point. DIGITALEUROPE is afraid that this might be the case.

14. Section III, Article 21 to 31: Eligible costs

The document is using different terms:

- total eligible cost (Article 22),
- direct cost (Explanatory Memorandum, p. 3)
- total direct eligible cost (Explanatory Memorandum, p. 3: Article 24)

As these terms are not clearly defined in the proposed text and only hints are given to New Financial Regulations, which are not yet available, the real impact of the proposed funding models in conjunction with the 20 % flat rate for indirect cost cannot be assessed yet.

In this reference the flat rate for “indirect cost” is based on “total direct eligible cost”. Due to the fact that the New Financial Regulations are not available yet, it is not clear, what is meant with “total direct eligible cost” and which financial impact can be expected from the new simplified funding model.

For beneficiaries that have an analytical accounting system the application of a flat rate on eligible direct costs to determine eligible indirect costs should not be mandatory. Such beneficiaries should be allowed to charge direct and indirect project costs that are basically determined according to their usual accounting principles. Otherwise they would be forced to establish and maintain a parallel accounting system to determine their costs for funded projects which would mean a heavy administrative burden.

ABOUT DIGITALEUROPE

DIGITALEUROPE represents the digital technology industry in Europe. Our 100+ members include some of the world's largest IT, telecoms and consumer electronics companies and national associations from every part of Europe. DIGITALEUROPE wants European businesses and citizens to benefit fully from digital technologies and for Europe to grow, attract and sustain the world's best digital technology companies.

DIGITALEUROPE ensures industry participation in the development and implementation of EU policies. DIGITALEUROPE's members include 58 global corporations and 34 national trade associations from across Europe. In total, 10,000 companies employing two million citizens and generating €1 trillion in revenues. Our website provides further information on our recent news and activities: http://www.digitaleurope.org

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