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THE EVOLUTION OF THE GENERAL CONDITIONS APPLICABLE TO CONTRACTS UNDER THE FRAMEWORK PROGRAMME OF THE EUROPEAN UNION : THE END OF PRE-COMPETITIVE RESEARCH ?

The Framework Programme of the European Union has become a household name within the European research and development community. It has become the main instrument of the European Commission for the support of research and development within the Member States. The status of the Framework Programme as such has been laid down in the Treaty establishing the European Union (art 130 I). There it is said that the Commission has to use a Framework Programme for the implementation of its R&D activities.

It all started in the first half of the 1980's within the IT-industry with the ESPRIT programme and its precursors. The European Commission started by means of separate programmes to support its industry and researchers. New initiatives were taken for other industries as well and the need to come to a co-ordinated action was felt quickly. So the first Framework Programme was drafted in 1986.

The official doctrine of that moment was that the European Commission would support pre-competitive research. Research that was sufficiently distanced from the market place so that it would not pose a problem to the competitors on that market place to share the results thereof. This research would be partly funded by the European Commission and the results of the co-operation would be made accessible to at least the participants in one project.

"Pre-competitive research " is still an official part of the Commission policy, not only of its innovation policy but also of its competition policy.

I refer i.a. to the "Community Framework for State Aid for Research and Development (O.J. 96/C/45/06) laying down the criteria used by the Commission when examining measures of the Member States. Paragraph 2.2 thereof reads as follows :

2.2 The closer the R&D is to the market, the more significant may be the distortive effect of the State aid. In order to determine the proximity to the market of the aided R&D, the Commission makes a distinction between fundamental research, industrial research and pre-competitive development activity. Definitions of these various stages of R&D, which correspond to those laid down in the Agreement on Subsidies and Countervailing Measures, are set out in Annex I the framework.

The definition of pre-competitive development referred to is as follows :

By pre-competitive development activity is meant the shaping of the results of industrial research into a plan, arrangement of design.

For new, altered or improved products, processes or services, whether they are intended to be sold or used, including the creation of an initial prototype which could not be used commercially. This may also include the conceptual formulation and design of other products, processes or services and initial demonstration projects or pilot projects, provided that such projects cannot be converted or used for industrial applications or commercial exploitation. It does not include the routine or periodic changes made to products, production lines, manufacturing processes, existing services and other operations in progress, even if such changes may represent improvements.

The Commission has now started the preparation for the sixth Framework Programme. If we compare the R&D contracts that were used under the five preceding Framework Programmes there is a clear tendency towards a restriction of the obligation to share the results. The aim of this article is to describe this evolution. In the initial contracts, all participants were entitled to exploit all results achieved by each partner. In the latest Framework Programmes, this is no longer guaranteed.

Within this article it is not possible to put this evolution in a broader perspective and to make an evaluation of it from an economic policy point of view.

However, the thesis that the original foundation of the Framework Programmes has shifted away from the basic idea of sharing pre-competitive research results is corroborated by the analysis made herein.

This evolution came along comes is combined with an evolution with respect to the content of the different Framework Programmes. Product development, closer to the market, is now also supported. As the support comes closer to the market, a different position of the European Commission might have been expected, more in line with the above mentioned competition policy: the closer to the market, the bigger the risks of limiting competition. But the Commission has nevertheless opted to accept in its own programme further limitations to the freedom of exploitation.

1. The start (1984 – 1987)

As stated above the starting point was the right for each contractor to exploit all research results achieved under a project.

Art. IV.2.a of the annex 4 of the standard agreement applicable to i.a. the ESPRIT projects (for the IT sector) laid down this principle:

"Each contractor participating in the same specific contract or in a complementary contract shall be entitled to exploit the results of said contracts and shall be granted unrestricted non-exclusive licensees and user rights, on a royalty free basis, for any foreground patents and foreground information as generated under said contracts".

Foreground patents and foreground information was thereby defined as "information generated by contractors under the contracts concluded for the execution of co-operative R&D" whether protected or not (respectively called foreground patents and foreground information).

This was complemented by an obligation for a contractor to grant other contractors licences and user rights "at appropriate non-discriminatory conditions" for any background patents and background information. Background is thereby defined as

"Technical information owned or controlled by contractors in the same or related field and necessary for either the execution of the contracts … or for the application of the results but not generated under the co-operative R&D …".

The obligation to grant access to the background was limited by the "major business interests" of said contractor or if a contractor was already using the relevant background for the products that were commercially available. (Art. IV.2.b of annexe 4 of the standard ESPRIT contract).

The aim of all these dispositions is clear: all contractors should be able to exploit all results obtained by all members of a consortium. Not only his own results but also the results of the other members of the consortium. The contract imposes upon each member of a consortium the obligation to grant the other members all necessary licences therefor.

2. The intermediate stages: the second, third and fourth Framework Programme (1988- 1998)

Starting from the second Framework Programme the Commission introduced one standard contract for the global Framework Programme. The same rules were applied to each project regardless the Programme it belonged to (the first Framework Programme ESPRIT had different rules from the projects of e.g. the New Materials Programme).

The concept remained more or less the same. Although the set of rules became much more complex, the right for each contractor to exploit all results achieved within the project remained the starting point. This was laid down in Art.17 of the General Conditions.

However, a limitation to the unrestricted freedom to exploit was introduced. The contractors still had to grant licences to each other and user rights for the own results but these licences would no longer "confer any right to sub-license" (art.17.2 of the General Conditions).

The consequences of this minor change were for some of the participants very important. Exploiting R&D results can, depending on the type of the party or on the type of results obtained, only be done effectively if sub-licenses can be granted. Said clause therefore excluded some parties from an exploitation of the results of a consortium.

A real life example to illustrate the situation was the consortium aimed at developing a software-package consisting i.a. of a major trans-national group and a software developer. The latter was not granted to right to grant sub-licenses on developments made by the trans-national group and could therefore not exploit the results of this consortium. The only option remaining for this party was to retire from the consortium. It should be underlined that major groups are seldom blocked by said rule. All right granted to a contractor can always be transferred to affiliates of this contractor and therefore the exploitation potential of results even without the right to grant sub-licenses remain high within any trans-national group.

The second relevant element of this period was the distinction made during this period between separate categories of contractors.

Practice within the consortia was such that from an early stage on the partners themselves made such a distinction: only the important partners bringing in sufficient background and manpower were considered "full contractors". Within a consortium "minor" contractors were not granted the same rights. Their rights to exploit the results and their access rights to the background of the other parties were limited within the agreements made within the consortium (the Consortium Agreements).

Said practice was accepted by the Commission and elaborated in the General Clauses and Conditions.

Art. 14.2 (a) of the General Conditions applicable to contracts in the fourth Framework Programme illustrates the limitation of the rights granted to such contractors:

Access-rights for foreground necessary for the exploitation of the results of their RTD-work in a contract within a community-Framework Programme shall be granted on favourable conditions for their work on the project to those associated contractors established in the community or in associate state and working in the project with the agreement of the relevant contractor granting the rights.

These contractors no longer received automatically rights on the results of all members of the consortium. This distinction between different contractors was another major limitation to the unlimited freedom to exploit as initially foreseen by the European authorities.

3. The end of the evolution: The Fifth Framework Programme

The evolution continued and was strengthened under the fifth Framework Programme.

Art. 14 of the model contract for the fifth Framework Programme introduces the notion of exclusive access-rights for exploitation of results.

This article reads as follows:

Contractors may, exceptionally grant exclusive access-rights to the knowledge resulting on the project for exploitation purposes:
- If it complies with competition policy, and in particular the community rules adopted to article 81 (3) of the Treaty establishing the European Community, and
- Provided that they are economically indispensable, taking into account in particular the market, the risks involved and the investments required.

This type of exception would have been unthinkable at the start of the European R&D policy. The notion of an obligation to grant the right of free exploitation is more or less abandoned here and the notion of exclusivity is introduced. Exclusive right will only be possible if all parties involved agree but the protection of an imperative set of rules imposing the grant of exploitation rights is no longer available.

This is even more apparent in art. 15 of the same agreement:

A contractor may refuse to grant access-rights for the exploitation of knowledge resulting from the project if he is exploiting it himself…. Such refusal shall only be justified, however, when it is economically indispensable in view, in particular, the market, the risks and the investment required exploiting the knowledge.

Taken together both articles make clear what the actual situation within an R&D consortium will now be. Each contractor will be entitled to exploit his own results but will no longer be assured to have exploitation-rights on results obtained by the other parties. The notion of free exploitation is therefore abandoned.

The Commission will limit its own role to guaranteeing the exploitation of the results by the party having obtained these results. This follows i.a. from the clauses added to both arts. 14 and 15 mentioned above whereby access rights to a party requesting these rights for the exploitation of his own result should never be refused. No party should be limited in the exploitation of his own results. But giving a party access rights to exploit results, not achieved by this party, is no longer an obligation under the fifth Framework Programme.

4. Conclusion

The evolution within the policy of the European Commission with respect to exploitation of R&D results obtained under the Framework Programme is clear: from the unlimited exploitation of all results by each contractor within a consortium the Commission has now limited its ambition to ensuring that each contractor is exploiting his own results.

Whether this is a sound policy is not a question that a legal practitioner should try to answer.

What is clear is that the situation of SME's, who were ensured of the same rights as the major participants at the start of the Framework Programme, is no longer as protected as it was then.

But aiming at an assured exploitation of results, at least by the party having developed it, it might be the only possible way forward. Parties are no longer willing to share results on the basis that these results are "pre-competitive". The reason therefore is clear: there exists no such thing as pre-competitive research within the labs of European Industry. Research executed by industry in its own facilities or paid for by that same industry and executed in external research labs, is as much part of the company’s strategy as is its own product development or marketing efforts. And companies are of course very reluctant to share the results of these efforts with competitors.