

SUPPORTING INSERT

Instructions, context and explanatory notes towards the role and use of article 8 of the Consortium Agreement ('*Foreground*')

BACKGROUND:

On behalf of the Dutch Ministry of Economic Affairs, Health~Holland (Stichting LSH-TKI) awards subsidy grants in research collaborations between private companies and research organisations. Finalized research collaborations will yield a body of intellectual property rights and know-how (the 'Foreground').

The involvement of public funds in these collaborations potentially constitutes as indirect State aid if one or more private companies takes advantage of the Foreground in case

- a) the Foreground are not generated by such private companies and
- b) the use of the Foreground by private companies takes place against a compensation paid towards the research organization(s) that is less than the fair market value represented by the Foreground.

Article 8 ('*Ownership of Foreground*') of the consortium agreement serves to ensure that the allocation and use of any Foreground takes place in accordance with State aid laws and regulations.

MAIN DOCUMENT:

The main guiding document is the '*Framework for State aid for research and development and innovation*', as published on behalf of the European Commission on 28 October 2022 and with reference number 2022/C 414/01 (the "**Framework**") and clauses 28, 29 and 30 of the Framework in particular. Whilst most of the provisions of clauses 28, 29 and 30 of the Framework are of a binding nature, some provide room for discretionary interpretation.

WHAT IS THIS INSERT:

This insert is a guide towards using methods of allocation of the Foreground which conform to the provisions of the Framework.

ROLE OF HEALTH~HOLLAND

The role of Health~Holland is limited to an assessment of the compatibility of the amended provisions of the Consortium Agreement, specifically article 8, as submitted by the consortium partners. Health~Holland is not involved in text proposals or actual amendments to the provisions of article 8 of the consortium agreement.

THE FRAMEWORK AND THE CONSORTIUM AGREEMENT

Any Foreground that is generated solely by a consortium participant will, by default, be owned by such same consortium participant. Once the research project is complete, a consortium participant may then use and exploit its proprietary Foreground to its own discretion.

1.1. **Allocation of Ownership**

Foreground and Allocation of Ownership

All consortium partners may grant 'access rights' and their subsequent expertise and body of 'background' in the research project. This may constitute, for example, as the access to a technology platform, as a collection of compounds and/or as bespoke assays. Such pre-existing technology and intellectual property rights are collectively referred to as their '*background*'.

A prevalent motivation of private companies to participate in a consortium is to receive the results deemed '*Foreground*', which constitute as those results which are a direct improvement, or a valuable supplement, to their background.

One of the guiding principles of the Framework determines that no indirect State aid is awarded if any Foreground resulting from the research project is allocated among the respective consortium participants in a manner which adequately reflects their respective contributions to the research project. Sections 8.3.3 and 8.4 of the consortium agreement highlight such concept.

Private companies should therefore reconcile their desire to receive the relevant 'foreground' with their commitment to making proportional contributions towards the research collaboration.

Health~Holland encourages all consortium participants to pre-determine in Section 8.4 of the consortium agreement which Foreground will be generated by which respective consortium participant throughout the research project. The allocation of the Foreground shall then be determined in proportion to the respective contributions to the project, thereby demonstrating compliance with the Framework.

Parallel Agreement

Alternatively, the consortium participants may enter into a research collaboration agreement (or a similar instrument), in parallel to the consortium agreement and which is required to be submitted to Health~Holland, which sets forth the respective activities that will be carried out by the respective consortium participants, together with a corresponding bespoke allocation of the Foreground. For the avoidance of doubt, this option is voluntary and not mandatory.

The consortium agreement would then need to acknowledge the research collaboration agreement and include an explicit confirmation that its provisions adhere to those incorporated in the Framework.

1.2. **Payment of a Market Price**

Sections 8.6, 8.7 and 8.8 of the consortium agreement address the right of private companies to exercise an '*option right*' to thereby receive either:

- (i) a license on the Foreground as held by the research organization(s), or
- (ii) ownership of the Foreground, in such event where allocation of such Foreground to the private company would not represent an adequate reflection of the contribution(s) made by such private company.

Either alternative, if exercised, must meet the minimum requirements highlighted in Section 8.8 (*'Essential Terms'*).

Market Price

The main requirement is for private companies to offer compensation which represents a '*market price*' of the Foreground. The Framework considers that the compensation offered conforms to the '*market price*' of the Foreground if the negotiations between the parties took place at '*arm's length*' conditions. The relevant parties are therefore required to demonstrate the fair and reasonable market value of the Foreground concerned.

This may involve the parties adhering to a transparent competitive sale procedure, or through the involvement of an independent expert valuator of the Foreground or by inserting a '*right of first refusal*' which enables the research organizations to solicit more economically advantageous offers from third parties.

In such context, the consortium participants are required, when applicable, to submit to Health~Holland:

- (i) their adherence to the Essential Terms set forth in Section 8.8 of the consortium agreement and
- (ii) an evaluation of the fair market value of the Foreground concerned and
- (iii) the methods of compensation offered (a lump sum payment, royalties, milestone fees, or a combination thereof) and
- (iv) their motivations which highlight their adherence to the provisions of the Framework.

either in the form of a *letter of intent*, a deed of assignment, or a license agreement which, at least, is in final agreed form.

QUESTIONS

Please consult with tki@health-holland.com.