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FOSTER RAIL

Future of Surface Transport Research Rail

Coordination and Support Action

Grant Agreement No 605734

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Deliverable D5.6

Report on competition and regulatory issue and comparison with other initiatives

WP	5	Fostering innovation and partnerships: ERRAC and SHIFT²RAIL
Task	5.2	Joint Undertakings: benchmark and future links

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[1] Dissemination level: **PU** = Public, **PP** = Restricted to other programme participants (including the JU), **RE** = Restricted to a group specified by the consortium (including the JU), **CO** = Confidential, only for members of the consortium (including the JU)

[2] Nature of the deliverable: **R** = Report, **P** = Prototype, **D** = Demonstrator, **O** = Other

Table of Content

1. Executive Summary

FOSTER-RAIL is a EU coordination and support action project under the 7th Framework Programme designated to support ERRAC (European Rail Research Advisory Council) in defining research needs for their strategies and programmes in order to realise the objectives of the Europe 2020 strategy.

The Foster Rail Work Package 5 (WP5) "Fostering innovation and partnerships: ERRAC and SHIFT²RAIL" relies on the implementation of the proposed joint undertaking for research, development and innovation for rail (under the acronym: SHIFT²RAIL). One objective of the WP5 was to undertake a benchmarking on the regulations and related rules that other sectors may have adopted in relation with running Jus/PPs so that to help the expected SHIFT²RAIL Joint Undertaking to run within one of the most efficient regulatory system.

This deliverable is part of the necessary work being undertaken by the project Foster Rail to provide recommendations for the best setup of the future SHIFT²RAIL joint undertaking, benchmarking with existing setup and providing a suggested regulatory structure for it.

This work has been carried on by Freshfields, as independent legal assistance under subcontracting scheme, with the support of UNIFE and the different SHIFT²RAIL promoting companies in particular on regulatory and competition law issues (as well as other specialist matters or issues that may arise and are not within the competence of the legal resources of the SHIFT²RAIL working group).

Freshfields developed the following:

- A detailed analysis of the Application of the "Named Beneficiaries Concept" for EU funding, in particular with the focus for SHIFT²RAIL;
- A review and analysis on Intellectual Property Rights to be applied to a PPP scheme as SHIFT²RAIL;
- A detailed Proposal for a Council Regulation on the SHIFT²RAIL Joint Undertaking.

2. Overview

2.1 Detailed analysis of the Application of the "Named Beneficiaries Concept" for EU funding, in particular with the focus for SHIFT²RAIL

Freshfields was asked to compare related rules and concept of the so called Named Beneficiaries for EU funding that other sectors may have adopted. This cross-analysis with running Joint Undertakings/PPPs have helped to understand what can be expected for a future SHIFT²RAIL Joint Undertaking regulation and if the regulation could take into account the most efficient regulatory system aspects of running JUs/PPPs.

In summary the deliverable provided the following findings:

- The Named Beneficiaries Concept requires that grants are subject to (annual) work programmes and that the beneficiaries are already identified in the basic act.
- There are no specific criteria and requirements for such basic acts in the field of research and technological development.

- In the absence of more specified criteria, the general principles applicable to grants, i.e. transparency and equal treatment, should serve as a guideline. It might thus be considered necessary to tender membership to the S2R-PPP similarly to the tender procedures previously launched by the Clean Sky Joint Undertaking (JU). The S2R-PPP would also need to be open for accession and changes to membership similar to the provisions in the Clean Sky-JU.
- The Commission has a broad discretion with respect to what is appropriate to achieve the objects of the Horizon 2020 Framework Programme. It cannot thus be excluded that the Commission will finally oppose to the implementation of the Named Beneficiaries Concept in the S2R-PPP.

2.2 Review and analysis on Intellectual Property Rights to be applied to a PPP scheme as SHIFT²RAIL

Freshfields was asked to compare the rules of Horizon2020 related to intellectual Property Rights with the IPR experience that some legal resources of the SHIFT²RAIL working group had with the running SESAR Joint Undertaking. This helps to clarify some aspect of competition and information sharing in order to foresee the future legal documentation that would be needed for governing SHIFT²RAIL activities.

In summary the deliverable provided the following findings:

➔ Specification is needed for the definitions of Background and Results; provisions are joint ownership; transfer of results; licensing of results, Affiliated Entities and Access Rights. Amendment seems advisable for definitions of Background, Results, Fair and reasonable conditions and Exploitation; the provisions are joint ownership; Affiliated Entities and Access Rights. One should at least add that Results include results that were generated by third parties on behalf of a Partner; that owners or joint owners must seek appropriate IPR protection and provisions in relation to Access Rights granted by and to Partners who terminate during the project.

2.3 Detailed Proposal for a Council Regulation on the SHIFT²RAIL Joint Undertaking

Freshfields was asked based on the analysis made with running JUs/PPPs to elaborate a possible proposal for a council regulation. Freshfields chose to approach a regulatory scheme similar to the SESAR JU.

Note: The result of this work is considered as confidential by the Foster Rail partners and the European Commission.

3. Annexes

3.1 Detailed analysis of the Application of the "Named Beneficiaries Concept" for EU funding, in particular with the focus for SHIFT²RAIL

Freshfields Bruckhaus Deringer

Memorandum

TO UNIFE / Giorgio Travaini

FROM Dr Juliane Hilf
DATE 11 December 2012

Shift²Rail – Application of the "Named Beneficiaries Concept" for EU funding

As agreed in our meeting on December 3, 2012, in the following we will provide you with an outline of the legal requirements to realize the so-called Named Beneficiaries Concept when establishing a public-private-partnership pursuant to Art. 187 TEU (***PPP***) in the Rail Industry (the ***S2R-PPP***), *i.e.* allowing to provide funding of members of the S2R-PPP without a call for proposal but based on their identification in (annual) implementation plan.

In Summary:

- The Named Beneficiaries Concept requires that grants are subject to (annual) work programmes and that the beneficiaries are already identified in the basic act.
- There are no specific criteria and requirements for such basic acts in the field of research and technological development.
- In the absence of more specified criteria, the general principles applicable to grants, *i.e.* transparency and equal treatment, should serve as a guideline. It might thus be considered necessary to tender membership to the S2R-PPP similarly to the tender procedures previously launched by the Clean Sky Joint Undertaking (***JU***). The S2R-PPP would also need to be open for accession and changes to membership similar to the provisions in the Clean Sky-JU.
- The Commission has a broad discretion with respect to what is appropriate to achieve the objects of the Horizon 2020 Framework Programme. It cannot thus be excluded that the Commission will finally oppose to the implementation of the Named Beneficiaries Concept in the S2R-PPP.

In Detail:

I. General legal requirements for grants and managing of public funds by PPPs

According to Art. 208(1) Council Regulation 966/2012 (the ***Financial Regulation***), bodies having legal personality set up by a basic act and entrusted with the implementation of a public-private partnership shall adopt their financial rules. Those rules shall include a set of principles necessary to ensure sound financial management of Union funds. Art. 208(4) Financial Regulation further stipulates that the financial rules of those bodies shall not depart from a model financial regulation except where their specific needs so require and with the Commission's prior consent.

The Commission has, on the basis of the predecessor of the Financial Regulation, adopted a general framework financial regulation for bodies set up under the TFEU and which have legal personality and receive contributions charged to the budget of the EU, cf. Commission Regulation 2342/2002 (***Framework Financial Regulation***). According to Art. 75 Framework Financial Regulation, where the body may award grants in accordance with its constituent instrument, the relevant provisions of the general Financial Regulation shall apply (subject to further requirements such as written agreements between the body and the beneficiary, and provisions for suspension, reduction, or termination, cf. Art. 75 (2) and (3) Framework Financial Regulation). Thus, the provisions of the Financial Regulation are not only relevant for grants *to* the body, but also for grants *by* the body.

Pursuant to the Financial Regulation, grants shall be subject to the principles of transparency and equal treatment, cf. Art. 125(1) Financial Regulation. In particular, grants shall be **subject to work programmes**, which shall be **implemented through** the publication of **calls for proposals**, cf. Art. 128 (1) Financial Regulation. However, there is an **exception** to calls for proposals, in particular where the **beneficiary** is already **identified in a basic act**, cf. Art. 128(1)((2)) Financial Regulation. *Beneficiary* in this sense means any natural or legal person with whom a grant agreement has been signed or to whom a grant decision has been notified, cf. Art. 2(g) Financial Regulation. A *basic act* within the meaning of the Financial Regulation is a legal act (not mere recommendations and opinions) which provides a legal basis for an action and for the implementation of the corresponding expenditure entered in the budget, cf. Art. 2(d) Financial Regulation.

According to the Rules of Application set out in Art. 190(1)(e) Commission Delegated Regulation C(2012)7507 final dated October 29, 2012 (the ***Delegated Financial Regulation***), the mentioned exception to the calls for proposals applies *inter alia*

> *"in the case of research and technological development, to bodies identified in the work programme referred to in Art. 128 of the Financial Regulation, where the basic act expressly provides for that possibility, and on condition that the project does not fall under the scope of a call for proposals."*

As set out in Recital 47 Delegated Financial Regulation, and aligned with Art. 125(1) Financial Regulation, these provisions are aiming to ensure equal treatment and avoid restricting access to EU funding. However, the criteria and requirements for such basic acts in the field of research and technological development are not further refined in this context.

As far as can be seen, the named beneficiaries concept has only be applied so far by the Clean Sky-JU, cf. Council Regulation (EC) 71/2008 (***CS-Regulation***). Neither the SESAR-JU (cf. Council Regulation (EC) 219/2007 (***SESAR-Regulation***) nor any other of the Joint Technology Initiatives established under the 7th Framework Programme except for the Clean Sky-JU apply the Named Beneficiary Concept, though the SESAR-Regulation does not explicitly require a call for proposal when implementing the budget either, cf. Art. 4 SESAR-Regulation. However, the SESAR-JU is only comparable to a limited extent since it provides for a right of the Commission to be stipulated, in the general agreement between the Commission and the SESAR-JU, to oppose the use of the

Community contribution for certain purposes, cf. Art. 4(2)((3)) SESAR-Regulation.

II. Implications on S2R-Proposal

As shown above, the financial regulations with respect to grants in general and by PPPs in particular require, in general, a call for proposal but allow for an exception where the beneficiary is named in the basic act. Thus, **members** to be funded need to **named as beneficiaries** in the S2R-PPP-Regulation as the relevant basic act in accordance with Art. 128(1)((2)) Financial Regulation and Art. 190(1)(e) Delegated Financial Regulation. In consequence, and similar to Art. 3(1)(b), 13(2)(a) Statutes of the Clean Sky-JU, the signature parties to the S2R-Memorandum of Understanding should be named in the S2R-JU, and become founding members upon acceptance of the statutes of the S2R-PPP.

In addition, the implementation of the Named Beneficiaries Concept shall be fully aligned with the **principles of transparency and equal treatment**. Thus, the S2R-Proposal should provide for procedural provisions in order to ensure transparency, and establish **rules for accession** to, and changes to membership of, the S2R-PPP (similar to Art. 3(2) CS-Regulation, Art. 4 Annex I CS-Regulation) to ensure equal treatment with respect to grants by the S2R-PPP. Besides such general principles and the provisions in the Financial Regulation as set out above, there do not exist any more specific criteria for the implementation of the Named Beneficiaries Concept when establishing a PPP under the Horizon 2020 Framework Programme.

However, we understand that the Clean Sky-JU launched formal tender procedures for (additional) associate members to apply. We would thus assume that this is to be expected from the S2R-JU by the Commission as well. Such **tender procedures** could serve to mitigate, though not providing legal certainty to eliminate, concerns by the Commission on lack of transparency and equal treatment with respect to the members of the S2R-PPP.

III. Conclusion and remaining risks

Since the Commission has a **broad discretion** with respect to what is appropriate to achieve the objects of the Horizon 2020 Framework Programme, it cannot be excluded that the Commission will oppose to the implementation of the Named Beneficiaries Concept in the S2R-PPP.

Even if the Commission agrees with, and brings forward, the S2R-Proposal implementing the Named Beneficiaries Concept, such **provisions might** as well **be challenged by member states** of the EU, or **potential membership candidates** among the European industry, at the courts. As the basic act is envisaged in the form of a Council Regulation, Member States may challenge it in accordance with Art. 263(2) TFEU at the Court of the EU. The same applies to natural and legal persons if they are directly concerned, cf. Art. 263(4) TFEU. If *e.g.* a natural or legal person seeks membership to the S2R-JU and accession is being denied by the competent body empowered to do so in the JU-Regulation, the denied person may wish to challenge the decision. As this act is of a binding nature for the person, it cannot be excluded that it would have to be seen as an act attributable to the European Union in the sense of Art. 263(1)((2)) TFEU, which may be challenged in the same way as the Regulation itself, unless provided otherwise in the JU-Regulation, cf. Art. 263(5) TFEU.

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3.2 Review and analysis on Intellectual Property Rights to be applied to a PPP scheme as SHIFT²RAIL

Freshfields Bruckhaus Deringer

MEMO

	NAME	ORT
AN	UNIFE	Brussels

ABSENDER Sebastian Böttger
DATUM 2. September 2013

Review of Powerpoint Presentation "Shift2Rail Intellectual Property Rights (IPRs)"

Scope:

UNIFE asked us to review the Powerpoint Presentation which UNIFE sent us by e-mail dated 16 August 2013 and check whether the proposed allocation of IP rights is appropriate from an IP perspective. We have not checked it in other regards, in particular not whether it is in line with anti trust laws.

Findings:

The proposed allocation of IP rights would work and is appropriate. We understand that the Powerpoint Presentation only explains the basic principle and all clauses will still be specified plus additional provisions added (such as in the Governance Rules that applied during preparatory work). Therefore, we only briefly indentified in the following where specification is needed, amendment recommended or additional provisions need to be added.

Specification is needed for the definitions of Background and Results; provisions re joint ownership; transfer of results; licensing of results, Affiliated Entities and Access Rights. Amendment seems advisable for definitions of Background, Results, Fair and reasonable conditions and Exploitation; the provisions re joint ownership; Affiliated Entities and Access Rights. One should at least add that Results include results that were generated by third parties on behalf of a Partner; that owners or joint owners must seek appropriate IPR protection and provisions in relation to Access Rights granted by and to Partners who terminate during the project.

In detail (whereby we follow the outline of the Powerpoint Presentation):

1) Definitions

1.1 At Background we would add examples in order to clarify which types of rights are meant. The point

in time "issuance of the Grant Agreement" should be amended if there is a time period between conclusion of the Grant Agreement and beginning of the project in order to cover those rights that are acquired within this time span (could be amended to: "beginning of the project"). Moreover, a further case group "developed independently of the project" could be added in order to clarify that Background that was acquired after beginning of the project and independently of the project (and therefore does not constitute "Results") can be included as Background if that is a relevant scenario. We would take out the next bullet "needed by a Partner for carrying out (…)" because this does not concern the definition of Background but a requirement for the access.

1.2 At Results we would again include examples in order to clarify which types of achievements are meant. It should be added that this includes Results that were generated by third parties which carried on project work on behalf of the Partner.

1.3 Fair and reasonable conditions should not be explained as "appropriate" as this is more indefinite than fair and reasonable. As far as licences at least to third parties against remuneration are concerned one could also refer to "customary in the market".

1.4 At the definition of Exploitation, one could also further restrict the possible exploitation under access rights for example "in further research activities in the same field" (if that is wanted) or specify terms "or in developing, manufacturing and distributing a product (…)" because "creating and marketing" again are less definite.

2) Ownership of results

At the beginning of Joint ownership of Results the minimum requirement for joint ownership needs to be added (that the results in fact were jointly generated). It should be provided what applies if the contributions in a joint result can be ascertained and separated for IP protection, i.e. there is sole ownership in the contributions. One should add what exactly must at least be provided for in the Joint Ownership Agreement (application for protection as IP-right, maintaining the IP-right, defence of the IP-right and use of the results). The then following "directly exploit" could be to narrow, if it referred to the definition of "Exploitation". The joint owner must be allowed all types of use of the own results irrespective of a (narrowing) definition of Exploitation. In the next half sentence it should be added that the non-exclusive licences to third parties are not sub-licensable. Thereafter, one should specify that "Fair and reasonable conditions" in this case means that the licensing joint owner must pay a royalty to the other joint owners. Moreover, we would add that if results are capable of protection as IP-right, the respective owner shall apply for (or also "shall maintain") effective IPR protection and that joint owners must not publish joint results without consent of the other joint owners as this could impair possible IPR protection.

3) Transfer of Results

At "Pass on Obligations" it should be clarified which obligations exactly this refers to (at least all obligations in relation to access rights). In the second bullet ("… can object if Access Rights are

affected"), the process and scope are not clear. This should be explained, for example in the way that the Partners will check and may object if the obligations were not validly passed on to the recipient. In the last sentence ("possible waiver of prior notice of transfer to a specifically identified third party…") we take that this refers to a scenario where it can be ruled out that the Access Right is impaired, for example because this party in advance granted Access Rights to the Partners.

4) Licensing of Results

Here it should be clarified that this also applies to joint owners (joint owners must observe the condition). In the second bullet ("…consent of concerned partners shall be requested") it should again be specified under which circumstances this consent must not be withhold (as the access right is at least factually concerned in case of any exclusive licence).

5) Affiliated Entities

Here it should be briefly explained what Access Right means (for example to use results or background under the terms and conditions laid down in the agreement). In the second bullet ("…if needed to exploit the Results of the Partner to which it is affiliated") one should differentiate between Affiliates of the owner or joint owner on the one hand and Affiliates of Partners which only have an access right on the other hand. This is because again owners (and joint owners) must be able to allow their Affiliates the use of their (own) results irrespective of any further requirements. It should be specified what "Fair and reasonable conditions" in relation to the Affiliates of none-owners means (normally: the same conditions under which the none-owning partner obtains the Access Right). The third bullet ("…unless right of sub-licence has been granted under the Consortium Agreement") is unclear (Shall the Affiliate not need to request an Access Right if the Partner is allowed to sub- license his Access Right to it, and if so, does the Affiliate has to pay remuneration?).

6) Access Rights

It should be clarified if (and if so, the formal process) the Partners have to request an Access Right or whether it is already granted with conclusion of the agreement. In the first option there remains the risk that the owner impairs the Access Right (e.g. by transferring the results) before it is granted. At "if needed" one could at least in relation to Access Rights for the time after the project restrict to: "if coercible needed" in order to clarify that post- project Access Rights are only granted if the exploitation of own results is not possible without such access. At "Access Right to Background" ("royalty-free unless otherwise agreed prior to Grant Agreement") one should specify which types of agreements this could possibly refer to. Overall, in all sub- groups (3rd and 4th row) it should be clarified whether the rights are restricted (none-exclusive, non-transferable without right to sub-license or "solely for the performance of the work under the project"). Such restrictions would be standard in this type of agreement. However, one would need to make an exception for sub-licences to third parties that carry on project work on behalf of a Partner ("upon request"). Moreover, in the 4th row it should be added "…its own or jointly owned result" in order to clarify that this also applies to jointly owned results. The 5th row refers to "Fair and reasonable conditions (including royalty-free)". It would be more predictable if one at least fixed whether in the different sub-groups a licence is royalty-free or

against remuneration.

7) Further

There are also no provisions regarding termination of a Partner during the project. In such cases the access rights granted by this Partner would need to survive, the leaving Partner would need to lose its Access Rights (or with the exception of Background that he needs for exploiting own Results that were already obtained before the termination).